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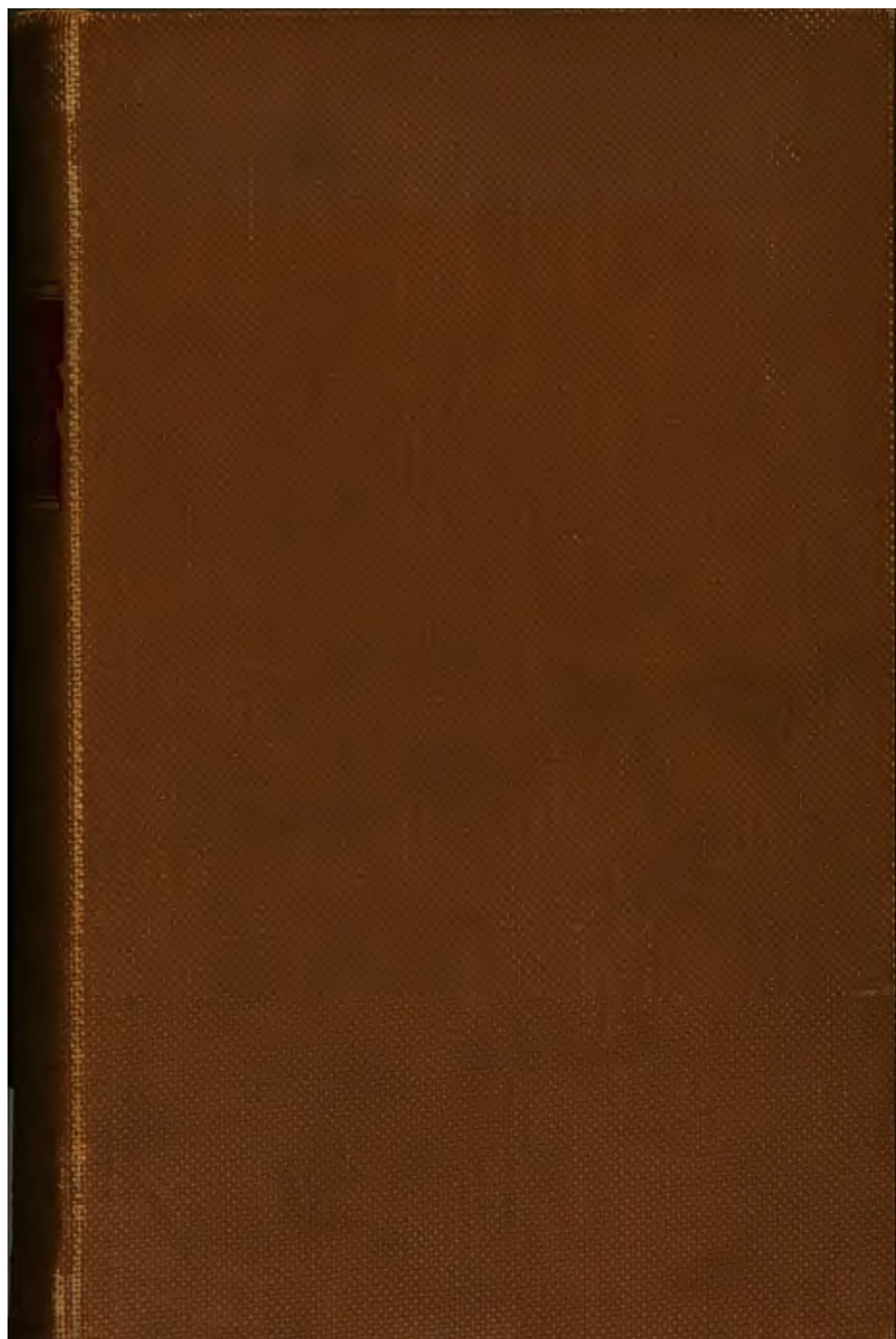
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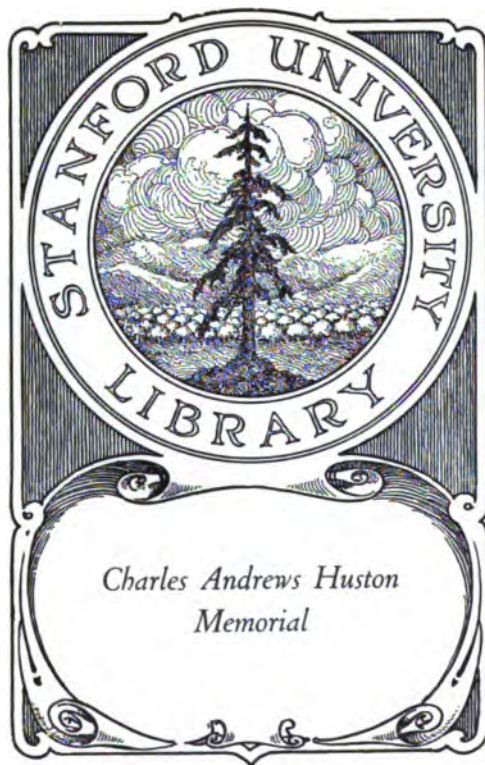
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A
TREATISE
ON
THE RIGHT OF PROPERTY
IN
TIDE WATERS
AND IN
THE SOIL AND SHORES THEREOF.

BY JOSEPH K. ANGELL.

SECOND EDITION: REVISED, CORRECTED, AND MUCH ENLARGED.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.

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PREFACE.

THE principal authority which has long been quoted and relied upon, relating to the subject of this work, is the Treatise *De Jure Maris*, published by Mr. Hargrave in his collection of Law Tracts, and ascribed by him (upon apparently sufficient authority, it has been considered*) to Lord Hale. His chapter upon this subject is preliminary to his principal design, which was to treat, *De Portibus Maris*, or of ports and customs. The production is obviously the result of very great research, and embodies many very ancient and important precedents. On this account, and also on account of the author's uncommon qualifications as a lawyer, his treatise has been received as a text-book, both in England and in this country.

In the year 1830, there was published in London "An Essay on the Rights of the Crown, and the Privileges of

* See Preface to Hall on the Rights to the Sea, &c. The work ascribed to Lord Hale is not contained in the schedule of manuscript books bequeathed by him in his will to the Society of Lincoln's Inn, "to be bounded in leather and chained, and kept in archives." See Life of Hale, by Runnington, prefixed to Hale's *Hist. of the Com. Law*. He was born in 1609.

the Subject in the Sea-shores of the Realm, by Robert Gream Hall, of Lincoln's Inn, Barrister;" which was intended by the author as a collection from the text writers, and decided cases, of the principal points of law on the subject; with a commentary upon such of them as would seem to have been rather loosely laid down by the authorities. In deference to the generally admitted authority of Lord Hale's production, he has made it the basis of his own.

Another work was published in London, in 1830, entitled "A Treatise on the Law of Waters and of Sewers," by Humphrey W. Woolrych, in two parts; the first part relating to the law of waters, and the second embracing the law of sewers. In the first chapter of the law of waters the various rights are enumerated. Certain rights which may be enjoyed in the sea, and those also which may be had in rivers, are mentioned in the second and third chapters. But throughout a very large portion of the first part of the work which relates to waters, the author's attention is directed to canals, dock companies, mills, water-courses, &c.

In 1839, was republished in Philadelphia * an English work, entitled "An Essay on Aquatic Rights; intended as an illustration of the law relative to Fishing, and to the property of ground or soil produced by alluvion and dereliction in the Sea and Rivers," by Henry Schultes. This

* In vol. 24 Law Library.

work was suggested, the author informs us, by the difficulties embarrassing the rules of construction of that part of the laws of England, relating to the rights of propriety in fisheries, and the soil of rivers and streams. The work, in the form of its republication above mentioned, embraces but fifty-two octavo pages; but the work is one of much learning and deep research; and the distinctions taken in it between the several kinds of piscarial rights, though, as the author says, on a cursory view, they may appear new, are very perspicuously drawn, and are well supported by legitimate English authority, which, it may be added, is in accordance with American authority.

The only work ever published, professedly designed as a full and systematical exposition of the law in this country, in relation to public and private rights in tide waters, and the interests of riparian proprietors connectively with public rights, was the first edition of the present work, though much time has elapsed since that period. To what extent the importance of the subject has been enhanced in the interval, is manifested by the many controversies in which it has been since involved, and by the greatly increased number of adjudged cases consequent thereupon, in further illustration of the subject. By some of these cases it will appear, that questions of grave importance have been earnestly and elaborately argued at the bar, and for the first time have been definitively determined by the bench. The adjudged cases having now become so very numerous, the author has omitted, in the present edition,

to give them all in an Appendix, as they were given in the preceding edition. There are three cases, however, which he now offers, (each at entire length,) in that form; and his reasons for being induced to believe, that this course would be acceptable to the profession, he would beg leave to state to be as follows:

The first case is that of *Blundell v. Catterall*, in the English Court of King's Bench, in the year 1821, which is important, as deciding that the public have no right, by the common law, to pass over a part of the shore of the sea, which is owned by an individual, for the purpose of *bathing*; and it is the first and only case in which that right was ever made the subject of controversy. What besides entitles the case to a place in the Appendix, and to the student's particular attention, is an elaborate discussion by each of the judges, in delivering his opinion, of the general principles of law in respect to the right of property in tide waters, in connection with the private rights of riparian proprietors; and a learned review of the early authorities, by which those principles were first established. The want of unanimity in the opinions of the judges gives to it an additional interest.

The next case is that of *Martin et al., plaintiffs in error, v. Waddell*, defendant in error, in the supreme court of the United States; the opinion and decision in which has special reference to the effect of colonial charters, and the event of the Revolution upon the *primâ facie* sovereign and public right, by the common law, in and to tide water,

and the soil under the same, and the shores thereof. The subject of the controversy is one upon which very learned lawyers have entertained discordant opinions, and one upon which the court itself was divided in opinion; Justices Thompson and Baldwin both dissenting from the majority, and the former delivering an elaborate opinion in the support of his views, contrary to the views of the majority.

The third case is Pollard's Lessee, plaintiff in error, *v.* Hagan et al., defendants in error, also in the supreme court of the United States. This case decides the important question, whether the law, as to the rights both of property in tide waters, and of sovereignty and jurisdiction over the same, in the *new* States, is the same as in the *original* States. In other words, whether the former, which had been temporarily held by the United States, pass to a new State, upon its admission into the union. There was also a divided opinion in this case; and the dissenting judge, Mr. J. Catron, concludes his opinion by declaring the controversy to be the most important ever brought before that court, either as it respects the amount of property involved, or the principles upon which the judgment proceeded.

Providence, June 1, 1847.

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INTRODUCTION.

OF THE RIGHT OF TERRITORIAL JURISDICTION OVER THE SEA, ARMS OF THE SEA, AND NAVIGABLE RIVERS.

As the right of property in the sea, arms of the sea, and navigable rivers (the subject proposed) is involved with the sovereign right of *territorial jurisdiction*, and is co-extensive with it,¹ the latter subject suggests a claim to attention as preliminary to an essay in exposition of the law of the former.

In regard to the jurisdiction of nations and states over the *open sea*, by virtue of jurisdiction over adjacent territory, it is only necessary to refer to the well established rule, that, from its nature, it cannot be possessed; and that it is therefore regarded as the common property, as is signified by the common term, "common highway," of nations. The dominion of a nation is allowed, however, to extend so far from the land as is necessary for its own safety.

¹ Pollard's Lessee v. Hagan, 3 How. (U. S.) R. 212; App. cxiv.

The writers upon maritime and international law admit, that every nation has jurisdiction to the distance of *cannon shot*, or maritime league, over the waters of its adjacent shores.¹ The Congress of the United States have recognized this limitation, by authorizing the District Courts to take cognizance of all captures, made within a marine league of the American shores.² The power of a nation within its own territory, is absolute and exclusive, and the seizure of a vessel within the range of its cannon shot, by a foreign force, is an invasion of that territory, and an act of hostility.³ It is true, indeed, that the maritime authority of a nation, to secure itself from injury, may be extended beyond the limit of its territory, as in the instance of the acknowledged right of a belligerent to search a neutral vessel on the high seas for contraband of war.⁴

History, however, it is well known, affords instances in which a greater extent of dominion over the sea has been arrogated by nations and states than the limit above prescribed, or than that consistent with strict justice. The naval strength of England has emboldened its monarchs to attribute to themselves as Lords paramount, the whole sea which surrounds their island, even as far as the opposite coasts.⁵

¹ Vattel, 207; Bynk. 61; 1 Azuni, 204; Ib. 185.

² Act of Congress, 1794, c. 50; 1 Kent, Comm. 29.

³ Church v. Hubbard, 2 Cranch, (U. S.) R. 234; 1 Kent, Comm. 26.

⁴ Church v. Hubbard, *ib. sup.*

⁵ Selden's *Mare Clausum*, L. 1, b. 2; Vattel, 191; 1 Kent, Comm.

Whatever opinion, (says a modern English writer),¹ foreign nations may entertain in regard to the validity of the claim to an absolute dominion and ownership over the British seas by the king, yet the subjects of the king do, by the common law of the realm, acknowledge it, and declare it to be his ancient and indisputable right. There are, he says, eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion, and consequently his ownership, over the British seas; but however this may be, and probably will ever continue, *vexata quæstio* between such writers, and the writers on the common and municipal law of England, the latter, as well as the decisions of English judicial Courts, all speak the same language, and appropriate the dominion of the British seas *tam aquæ, quam soli*, to the king.²

It is considered just, that the extent of the jurisdictional claim of a nation should be limited by a due regard for its own safety. Kent says, that considering the great extent of the line of the American coast, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction, and he thinks it not unreasonable to assume, for domestic

¹ Hall's Rights of the Sea Shore, &c., 2, 3.

² 1 Roll. 5; Lib. 15, 2, 168, 170; Lib. 42, 45; 3 Leo. 75; Co. Litt. 107, 260, b; Callis, 17; Molloy, 375; Black. Comm. 274; Hale, *De Jure Maris*, 11, 18.

purposes connected with our safety, the control of the waters on our coast, though included within lines stretching from quite distant headlands, as for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.¹

The part of the sea which is not within the body of a *county*, is considered as the "main sea" or ocean; and such is the interpretation of the words "high seas," in the penal code of the United States.² The general rule, as it is often laid down in the books, is, that such parts of rivers, arms and creeks of the sea are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale uses more guarded language, and says, "the arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, *or at least may be*, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner."³ Hawkins confines it to such parts of the sea, where a man standing on the one side may see what is done on the other.⁴ Relying upon these authorities, Mr. J.

¹ 1 Kent, Comm. 29.

² Hale, *De Jure Maris*, Harg. Tracts, 10. See also 3 Black. Comm. 106; *United States v. Wiltberger*, 5 Wheat. (U. S.) R. 76.

³ Lord Hale, *as sup.*, who cites, Fitzh. Abr. *Corone*, 399, 8 Edw. II.

⁴ Pl. Cr. b. 2, ch. 9.

Story held, in *United States v. Grush*,¹ that where an arm of the sea, creek, haven, basin, or bay is so narrow, that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye objects on the opposite shore, the waters are within the body of a county. He did not understand the rule to be, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore ; but that objects standing on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguishable from each other. He held in this case, that the County of Suffolk in Massachusetts, in which the city of Boston is included, extends to all waters between the circumjacent islands, down to the Great Brewster, and Point Allerton. Among the several islands further out towards the ocean than others, is the Great Brewster on which the principal light-house stands. The extreme point of the main land, jutting from the southern coast opposite to this light-house, is called Point Allerton, and the distance between them is about one mile and a quarter. Processes from the State Courts of the county of Suffolk, have been at all times, without objection,

¹ *United States v. Grush*, 5 *Mason*, (Cir. Co.) R. 290.

served as far down as the Great Brewster ; but not below.¹

In *Cornfield v. Coryell*,² the question was presented whether, admitting the *locus in quo*, in which certain proceedings complained of took place, to be within the territorial limits of New Jersey, it was within the *county of Cumberland*. The boundaries of this county towards the bay are thus described by the act which created it : "then bounded by Cape May county to *Delaware bay*, and then *up Delaware bay* to the place of beginning." Mr. J. Washington said, that if the opinion of the Court upon the question as to the construction of the original grant of Charles II. to the Duke of York, was correct, it would seem to follow, that the western boundary of this county extends to low-water mark on Delaware bay ; the expression "to Delaware bay," implying nothing more than to the east side of that bay, which the law extends to low-water mark. The learned Judge, however, did not mean to give any decided opinion on this point, because, in the first place, if there was any weight in his suggestion, the legislature of the State could at any time, should it be deemed necessary, define with greater precision the limits of the county bordering on the bay ; and secondly, because it was not necessary to decide the point in the case before him.

¹ *United States v. Grush*, 5 Mason, (Cir. Co.) R. 290.

² *Cornfield v. Coryell*, 4 Wash. (Cir. Co.) R. 384.

It is clear, therefore, that "navigable" rivers which flow through a territory, belong to the jurisdiction of the sovereign of the territory adjoining. The well settled rule of the law of nations, is, that where an arm of the sea or a river is the boundary between two nations or states, if the original right of jurisdiction is in neither, and in the absence of any convention respecting it, each holds to the middle of the stream.¹ The true line of territorial boundary between the United States and the British Provinces in the bay and waters of Passamaquoddy, is the middle of the stream or channel, between the territories of the two countries; inasmuch as the treaty of 1783 contains nothing definite on the subject, and fixes generally the eastern boundary line of the United States on the bay of Fundy, of which Passamaquoddy bay is part.²

But where one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly established State extends to the river only, and the low-water mark is its boundary. This was held by the Supreme Court of the United States, in reference to the river Ohio, of which the State of Virginia was the original proprietor, and granted the territory on one side only to Kentucky; and the grant to Kentucky, it was held, did not include a peninsula, or

¹ Vattel, B. 1, ch. 22, s. 266, 274; Marten, B. 4, ch. 3, s. 3, 4, 5.

² The Schooner Fame, 3 Mason, (Cir. Co.) R. 147.

island, in the western, or northwestern bank, separated from the main land by a channel, or bayou, which is filled with water only when the river rises above its bank, and is, at other times, dry.¹ If a river subject to tides, constitute the boundary of a State, and at flood the waters flowed through a narrow channel, around an extensive body of land, but receded from the channel at ebb, so as to leave the land surrounded at high water connected with the main portion of the country; this portion of the territory would scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the jurisdiction over, and the right of property in, the river.² When the States of Maryland and Virginia ceded to Congress the portions of the territory embracing the river Potomac within their limits, whatever the legislatures of those States could have done by their joint will, after that cession, could be done by Congress, subject only to the limitation imposed by the acts of cession.³

The principal question in *Cornfield v. Coryell*, in the Circuit Court of the United States, for the third Circuit,⁴ was as to what were the boundaries of the

¹ *Handly's Lessee v. Anthony*, 5 Wheat. (U. S.) R. 374, recognized as authority in the case of the Schooner *Fame*, *ub. sup.*

² *Handly's Lessee, &c.*, *ub. sup.*

³ *Georgetown v. Alexandria Canal Co.* 12 Peters, (U. S.) 91.

⁴ *Cornfield v. Coryell*, 4 Wash. (Cir. Co) R. 384.

State of New Jersey on the Delaware bay and river, under the grants of Charles II. to the Duke of York, and the grant of Charles to the proprietaries of Pennsylvania; and what are those boundaries in consequence of the Revolution, and the treaty of peace. The following were the views of Mr. J. Washington : — “ The grant from Charles II. to his brother, the Duke of York, of the territory of which the present State of New Jersey was a part, dated the 12th of March 1663 – 4, was of all that territory lying between the rivers St. Croix adjoining Nova Scotia, and extending along the sea coast southerly to the east side of Delaware Bay, together with all islands, soils, rivers, harbors, marshes, waters, lakes, fishings, huntings and fowlings, and all other royal ties, profits, commodities, hereditaments and appurtenances to the same belonging and appertaining, with full power to govern the same.

“ The grant of the Duke of York dated the 24th of June 1664, to Lord Berkley and Sir George Carteret, after reciting the above grant, conveys to them all that tract of land lying to the westward of Long Island and Manhattan’s Island, bounded on the east, part by the main sea, and part by Hudson’s River, ‘ and hath upon the west Delaware bay or river, and extended southward,’ &c. with all rivers, fishings, and all other royalties to the said premises belonging, &c.

“ There is no material difference between these

grants as to the boundaries of New Jersey on the westward ; and we are of opinion that, although the rule of the law of nations is, that where a nation takes possession of a country separated by a river from another nation, and it does not appear which had the prior possession of the river, they shall each extend to the middle of it ; yet, that when the claim to the country is founded, not on discovery and occupancy, but on grant ; the boundary on the river must depend upon the just construction of the grant, and the intention of the parties, to be discovered from its face. Taking this as the rule, we think the claim of New Jersey *under these grants* to any part of the bay or river Delaware below low-water mark cannot be maintained. The principle here suggested is, we conceive, fully recognized and adopted by the Supreme Court in the case of *Handly's Lessee v. Anthony*.¹ Neither do we conceive that the limits of the State can, by construction, be enlarged in virtue of the grant of all rivers, fishings, and other royalties ; which expressions ought, we think, to be confined to rivers, fishings and royalties *within the boundaries of the granted premises*. This appears to have been the opinion of the crown lawyers, who were consulted more than a century ago respecting the boundaries of New Jersey and Pennsylvania, and this too after hearing counsel upon the question.

¹ 5 Wheat. 374.

Their opinion was, that the right to the river Delaware, and the islands therein, still remained in the crown.¹

“Notwithstanding this objection to the title of New Jersey, whilst a proprietary government, to any part of the bay and river Delaware, it seems that the proprietaries of West Jersey claimed, if not the whole of the river, a part of it at least below low-water mark, as far back as the year 1683, as appears by a resolution of the assembly of that province in that year, ‘that the proprietary of the province of Pennsylvania should be treated with in reference to the rights and privileges of this province to, or in, the river Delaware.’

“By certain concessions of the proprietaries, freeholders, and inhabitants of West New Jersey, some time about the year 1767, they granted that all the inhabitants of the province should have liberty of fishing in Delaware river, or on the sea-coast.

“In 1693 a law passed in that province, which enacted, that all persons not residing within that province, or within the province of Pennsylvania, who should kill, or bring on shore any whale, in Delaware Bay, or elsewhere within the boundaries of that government, should be liable to a certain penalty.

“In the year 1771 another act was passed for im-

¹ See Chalmers's Opinions.

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proving the navigation of the Delaware river, and in 1783 another act was passed which annexed all islands, islets, and dry land in the river Delaware belonging to the State, as low down as the State of Delaware, to such counties as they lay nearest to. And in the same year, the compact was made between the States of New Jersey and Pennsylvania, by which the legislatures of the respective States were authorized to pass laws for regulating and guarding the fisheries in the river Delaware, annexed to their respective shores, and providing that each State should exercise a concurrent jurisdiction on the said river.

“These acts prove, beyond a doubt, that the proprietaries of West New Jersey, from a very early period, asserted a right to the river Delaware, or to some part thereof, below low-water mark, and along its whole length; and since the western boundary of the province, under the grant to the Duke of York, was precisely the same on the bay as on the river, it may fairly be presumed, independent of his grant to the proprietaries in 1680, and the concessions made by them in the year 1676, that this claim was extended to the bay, for the purposes of navigation, fishing and fowling.

“In this state of things the revolution was commenced, and conducted to a successful issue; when his Britannic majesty, by the treaty of peace, acknowledged the several States to be sovereign and

independent, and relinquished all claims, not only to the government, but to the propriety and territorial right of the same. The right of the crown to the bay and river Delaware being thus extinguished, it would seem to follow, that the right claimed by New Jersey in those waters, was thereby confirmed; unless a better title to the same should be found to exist in some other States. Whether the claim of New Jersey extended to the middle of the bay, as we see by the compact with Pennsylvania it did to the middle of the river, is a question which we have no means of solving: but that the proprietors and inhabitants of West New Jersey made use of the bay, both for navigation and fishing, under a claim of title, from a period nearly coeval with the grants of the province, can hardly admit of a doubt. This right, indeed, is expressly granted by the Duke of York to William Penn, and the other proprietaries of West New Jersey by his grant, bearing date the 6th of August, 1680. It contains a grant, not only of all bays and rivers *to the granted premises belonging*, but also the free use of all bays and rivers *leading into*, or lying between the granted premises, for *navigation, fishing*, or otherwise. The only objection which could have been opposed to the exercise of those acts of ownership under this grant was, that the duke had himself no title to the bay and river Delaware, under the royal grant to him. But the presumption is, nevertheless, irresistible, that the

benefits intended to be bestowed by this grant, and which were confirmed by the other acts of the provincial government before noticed, were considered by the inhabitants of the province as being too valuable not to be enjoyed by them. This use of the bay and river amounted to an appropriation of the water so used,¹ and this title became, as has before been observed, indefeasible, by the treaty of peace, except as against some other State having an equally good, or a better title.

“How far this title in New Jersey may be affected by the grants of the Duke of York to William Penn in 1682, of the tract of country which now forms the State of Delaware, it would be improper, in this case, to decide. But that the use of the bay for navigation and fishing was claimed and enjoyed by the inhabitants of that province under those grants, is as fairly to be presumed, as that it was so claimed, and used by the inhabitants of New Jersey. And we are strongly inclined to think, that if the right of the former of these States to the bay of Delaware, was founded on no other title than that of appropriation, by having used it for purposes of navigation and fishing, the effect of the revolution, and of the treaty of peace, was to extend the limits of those States to the middle of the bay, from its mouth upwards.”²

¹ Vattel, b. 1, ch. 22, sec. 2, 66.

² See also *Bennet v. Boggs*, 1 Bald. (Cir. Co.) R. 60.

Although by the law of nations, in the absence of any convention or treaty, nations or states separated by a river or bay have each an absolute territorial jurisdiction only to the middle of the same, running the line at low-water mark ; yet it is not inconsistent with this doctrine, that the right to the use of the whole river or bay, for the purpose of navigation, trade and passage, may be common to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream ; but it is in the nature of an easement, as it is called at the common law, or a servitude, as it is called in the civil law. It is like the right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right, in all those cases where such a passage or navigation is ordinarily used by both nations or states, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation or state, without the necessity of the right of passing over the whole waters at all times. If, in such case, no exclusive right is recognized in either nation or state, the constant use by both is conclusive proof of a common right of passage and navigation in both.¹ And, in this country, if a State

¹ Opinion of Story, J. in the case of the Schooner *Fame*, 3 Mason, (Cir. Co.) R. 147.

is bounded by low-water mark on *one side* of a navigable river, the people of such State have a right to the free use of the surface of the whole of such river, for navigable purposes.¹

¹ See *post*, Chap IV.

A
TREATISE
ON
TIDE WATERS.

CHAPTER I.

RIGHT OF PROPERTY IN TIDE WATERS, &c. BY THE
CIVIL LAW AND BY THE COMMON LAW.

THE claim of the citizens and inhabitants of a state or country to the free use of the waters of the sea and their shores, for private advantage, is so obviously dictated by the law of nature, that in the first ages of all countries, they have been left open to public use.¹ It is either so directed by the positive

¹ See opinion of Best, J., in *Blundell v. Catterall*, App. p. vii. No sentiment appears more natural, than that the ocean, like light, is for the common benefit :

" Why do you refuse me *water* ? Water is
The *common right* of all." — *Ovid*.

" Who can forbid, from light to kindle light ?
And who 'd, for the Ocean, waters keep in store ? "

codes of law, or so made obligatory by the acknowledged customary or common law, of every enlightened nation. Thus, under the jurisprudence of Justinian :

*Et quidem naturali jure communia sunt omnium hæc ; aer, aquæ profluens, et mare et per hoc littora maris. Nemo igitur ad littus maris accedere prohibetur.*¹

“ And truly by natural right, these be common to all ; the air, running water, and *the sea*, and hence the *shores of the sea*. Nobody is therefore prohibited to come to the sea shore.”

*Flumina autem omnia, et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.*²

“ Also all *rivers* and *ports* are public, so that the right of fishing in a port and in rivers is common to all.”

*Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris, et ob id cuilibet liberum est casam ibi ponere in quam se recipiat : sicut retia siccare et ex mari deducere.*³

“ And by the law of nations the use of the shore is also public, and in the same manner as the sea

¹ Inst. 2, t. 1, s. 1.

² Inst. 2, t. 1, s. 1.

³ Ib. And see Dig. b. 43, t. 12, 13, 14 ; Zouch, *El Juris, Descriptio, Juris et Judicii Maritimi*, Part 1, s. 5 ; 2 Domat, Civil Law, 389, b. 1, t. 8, s. 1, 2. Civil Code of Louisiana.

itself, and for this reason any person is at liberty to place a cabin there, in which he may harbor himself, and for the like reason to dry nets and draw them from the sea."

The common law of England differs, and in some respects is at variance, with the doctrine of the civil law, as there will be occasion to notice in subsequent pages; but one essential difference it is proper here to notice. It clearly appears from the above passages from the civil law, that the waters of the sea and the shores of the same are subject to be used in common by people generally; every person being equally entitled to the benefit to be derived from fishing, drawing and drying nets, and navigation. They were expressly denominated by the Roman jurists, *res communes*, and considered as *res omnium*, in respect to their use and benefit, but in respect to *property* as *res nullius*. *Proprietas autem eorum potest intelligi, nullius esse.*¹ By the common law, the waters of the sea and the shores of the same are as much subject to public use as they are by the civil law; but the essential difference above referred to between the two, relates to what is just mentioned as the doctrine of the civilians, viz.: that such waters are the *property* of no one. The policy of the common law is to assign to every thing capable of occupancy and susceptible of ownership a legal and certain

¹ Taylor's Sum. of Roman Law, 246.

proprietor, and accordingly makes those things which from their nature cannot be exclusively occupied and enjoyed, the property of the sovereign.

The king, in England, is regarded as the *universal occupant*, and the presumption is, that all property was originally in the crown. Hence it is said, that all lands are holden mediately or immediately from the crown, and that the king has the *absolutum et directum dominium*, — a fiction of law adopted, not for the aggrandizement of the throne, but for the benefit of the subject.¹ The right of property in the tide waters of England is, moreover, vested in the king, not merely on the principle, that he is the universal occupant, but on the principle of his being the fountain from whence, in contemplation of law, all authority and privilege proceed. "Touching," says Callis, "our *Mare Anglicum*, in whom the interest therein is, and by what law the government thereof is, the king hath therein these powers and properties: 1. *Imperium regule*. 2. *Potestatem legalem*. 3. *Proprietatem tam soli quam aquæ*. 4. *Possessionem et proficuum tam reale quam personale*."²

To the king of England is, therefore, not only assigned the sovereign dominion of the sea adjoining the coasts, and over the arms of the sea, but in him is also vested the right of property in the soil thereof.

¹ Bract. L. 3, s. 190; 2 Bac. Abr. 177; 2 Roll. Abr. 168; 2 Bla. Comm. 14, 104; Hale, *De Jure Maris*.

² Callis on Sewers, 30.

Proprietas tam soli quam aquæ. It was resolved in the case of the Royal Fishery of the river Banne, in Ireland, that the sea is not only under the dominion of the king (as is said 6 Rich. 2 Fitz. Protect. 46 — the sea is of the legiance of the king as of his Crown of England), but it is also his proper inheritance, and therefore the king shall have the *land* which is gained from the sea (Dyer, 15). Also the king shall have the grand fishes of the sea (whales and sturgeons) which are royal fish. And all ports and havens which are *ostie et janua regni*, appertain to the king, because he is *custos totius regni*.¹ In the case of the Attorney General *v.* Richards, in the exchequer, the information stated, that by the royal prerogative, the sea and the sea coasts, and as far as the sea flows and reflows, between the high and the low-water marks, and all the ports and havens of the kingdom, belong to his majesty, and ought to be preserved for the use of his majesty's vessels and others, and that his majesty has the right of superintendency over them for their preservation.²

But although the dominion over, and the right of property in the waters of the sea and inland waters of the sea are in the crown, yet they are of common right public (as by the civil law) for every subject to navigate upon, and to fish in, without interruption; with the exception only of *royal fish*, the

¹ Case of the Royal Fishery in River Banne, Davies, R. 149.

² Attorney General *v.* Richards, 1 Anst. R. 603.

king's right to which is founded upon the consideration of his guardianship of the seas, and his protection thereof against pirates. And although the right of property in the soil covered and flowed by those waters, is in the king to high-water mark; yet the shore, or the land which is between the high and low-water marks,¹ is also of common right public.² The maxim is, *Rex in ea habet proprietatem, sed populus habet usum ibidem necessarium*;³ the king has the property, but the people have the use necessary. The rights of use are considered to emanate from the king to his subjects, who, by virtue of their subjection, become entitled to the free and uninterrupted enjoyment of what are deemed inherent privileges. These inherent privileges are those of navigation⁴ and fishery,⁵ privileges which are classed among those public rights denominated *jura publica*, or *jura communia*, and thus are contradistinguished from *jura coronæ*, or the private rights of the crown.⁶

¹ See *post*, Chap. III.

² Besides the foregoing authorities, see 5 Com. Dig. 102; 10 Rep. 141; Sid. R. 149; Salk. R. 357; Lord Fitzwalter's Case, 1 Mod. R. 105; Rex v. Smith, 2 Doug. R. 441; Sir Henry Constable's Case, 5 Co. R. 107; and the opinions of the several Judges in the more modern case, Blundell v. Catterall, in the King's Bench, App. p. i; Stratton v. Brown, 4 B. & Cress. R. 485; S. C. 10 Eng. Com. Law, R. 385; Somerset (Duke of) v. Fogwell, 5 B. & Cress. R. 883.

³ Callis on Sewers, 55.

⁴ See *post*, Chap. IV.

⁵ See *post*, Chap. V.

⁶ Schultes on Aquatic Rights.

They are said to exist of *common right*, which, according to Sir Edward Coke, is only another epithet for *common law*.¹ The common law of England is known by the various appellations of "right," "common right," "public right," and "*communis justitia*." When, therefore, it is said, that a man has a thing by common right, it is understood, that he has it by the common law. The common law is furthermore denominated "common right," because it is the common birthright or inheritance which the people have for the protection and safeguard of their privileges.² And it is the excellency, says Sir Edward Coke, of the common law, that the receding from the true institution thereof introduces many inconveniences, and that the observation of it is always accompanied with peace and quiet, the end and centre of all human laws.³

The right of property in tide waters, and in the soil and shores thereof, is *primâ facie* vested in the king, to a great extent at least, as the representative of the public. To such an extent, that to the rights of navigation and fishery he has no other claim than such as he has as protector, guardian or *trustee* of the common and public rights. Hence the king has no authority, and since Magna Charta, has never had, to obstruct navigation, or to grant an exclusive

¹ *Ib.*; 2 Inst. Expos. on Mag. Charta, 6, 21.

² 2 Inst. 56.

³ Epist. to 4 Rep.

right of fishing in an arm of the sea. The king's property in the sea, tide rivers, creeks, &c. is aptly compared by Lord Hale to the ownership of lords of manors in the common waste lands of the manor. The soil and freehold of the waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, &c., claimed and enjoyed by them by the custom of the manor, in and out of such waste lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights of fishing and navigation immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.¹ The important doctrine, that public rights, and such things as are materially dependent upon them, cannot be alienated by the crown, seems to have been established at a very early period. The rule, as laid down by Bracton, is, that these things which relate particularly to the public good cannot be given, sold, or transferred by the king, or separated from the crown. "*Res fiscalis dari non potest, nec vendi, nec ad alium transferri a principe vel a rege regnante et quæ faciunt ipsam coronam, et communem utilitatem respiciunt.*"² The same rule was also admitted by the feudal law: "*Res ad coronam regis, vel utilitatem publicam pertinentes inter sacras*

¹ Hale, *De Jure Maris*, 11.

² Bract. L. 2, c. 5, s. 7.

numerantur; neque recte in feudam dantur et quasi sacre dicuntur."¹ Hence the people of England are not only, *primâ facie*, entitled to the use of the sea, &c. for the purposes hereafter to be considered, but their right in this respect cannot be restrained or counteracted by any royal grant, on the ground that the king is the legal and sole proprietor. In favor of this view of the subject, we have the treatise of Lord Hale, and also the opinion of one of the modern Judges of the King's Bench, (Mr. J. Bayley), who says, "many of the king's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing, and the king can make no modern grants in derogation of those rights."² It is unquestionably true, as regards the authority of the crown, as was asserted by one of the learned judges in *Browne v. Kennedy*, in Maryland, that "the subject has, *de commune jure*, an interest in a navigable stream, such as a right of fishery and of navigation, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since *Magna Charta* at least."³ The king may doubtless

¹ Crag. Jus Feud. L. 1; Sholtes on Aquatic Rights.

² See opinion of Bayley, J., in *Blundell v. Catterall*, 5 B. & Ald. R. 91, and App. p. xxx, xxxi.

³ *Browne v. Kennedy*, 5 H. & Johns. (Md.) R. 203. No grant, therefore, by the king, before the Revolution, can be set up in this country. It is indeed true, that the crown had originally the power to defeat and restrict the public right of fishing, for it is proved by the

grant the *soil* covered by tide water to an individual, but the right of the grantee is always subservient to

private rights which now exist in England, and which have ever been recognized as valid. In the Statute 2 Hen. VI. c. 15, A. D. 1423, which prohibits the standing of nets over thwart rivers, there is a saving to the king's liege people of "their right, title, and inheritance in their fishings." Blackstone assumes, that the crown had this power, but thinks that the exercise of it was prohibited by the charter of king John, and the subsequent charter of Hen. III., by which even all grants of private fisheries made under Richard I. were annulled; so that, he concludes, an exclusive right of fishing in a public river ought now to be at least as old as the reign of Hen. II. (2 Black. Comm. 39). But private rights in rivers, and consequently rights of fishing, were restricted by statutes of a later date, which prohibited all weirs, kidels, &c., and the raising or enlarging of any built since the reign of Ed. I. 25 Ed. III. c. 4; 1 Hen. IV. c. 12; 13 Ed. IV. c. 7. (See these acts referred to in 20 Lond. Law Mag. 325, and in the case of Chester Mill, upon the river Dee, 10 Rep. 137; Williams v. Wilcox, 8 Adol. & Ell. R. 314). By the statute above referred to of Hen. VI. c. 15, all standing or fixed nets over thwart rivers are prohibited, with the saving of existing rights. By 3 Statute of Jac. I., c. 12, weirs all along the coast, or within five miles of any haven, are prohibited in favor of the breed of fish. Now in strictness (see 28 Lond. Law Mag. *sup.*), the enactments cited above extend only to prevent the inclosing of navigable rivers and the destruction of the fry and breed of fish, but in practice, and in favor of the public right, they have been carried further, and they have accordingly been held, to *prevent the crown* from granting any right of fishery, should the same not require the erection of any wear, or permanent or stationary net, for it is clearly the common law understanding, that a private and several right to fish in a navigable river, must *have its origin before Magna Charta* (See Carter v. Murcot, 4 Burr. R. 2163). In the article referred to in the Lond. Law Mag. *sup.*, the writer, after an attentive study of the authorities, concludes, that if a private right of fishing be proved, it must be presumed to have originated before Magna Charta, and then the crown was unrestrained. In Williams v. Wilcox, (8 Adol. & Ell. 314), it was held, that a wear appurtenant to a fishery, obstructing the whole or part of

the public rights above mentioned.¹ "The soil," says Mr. J. Best, "can only be transferred, subject to this public trust; and general usage shows, that the public right has been excepted out of the grant of the soil."²

The law, as applied in the court of Exchequer, is, that where a part of the sea-coast or shore, being the property of the crown, and giving *jus privatum* to the king, is granted to a subject for public uses, and to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, or if acted upon so as to effect a nuisance by working injury to the public right; or it is a grant which does not divest the crown or invest the grantee.³ The crown may, by letters patent, grant to a municipal corporation, or the corporation of a town or borough which is *caput portus*, all the land which is between high and low-water marks; but the subject matter of grant, as being a *jus privatum* in the king, must be subject to the *jus publicum*, or public right of the people to the passing and repassing over both land and water.⁴

a navigable river, is legal, if granted by the crown *before* the commencement of the reign of Ed. I. And see *post*, Chap. II. and Chap. V. on the Public Right of Fishery.

¹ See *post*, Chap. VII.

² Opinion of Best, J., in *Blundell v. Catterall*, *sup.* See also *Mayor of Colchester v. Brooke*, 9 Jur. 1090; Q. B., 5 Harr. Dig. 781.

³ *Attorney General v. Parmeter*, 10 Price, (Exchr.) R. 378-411.

⁴ *Attorney General v. Burridge*, 10 Price, (Exchr.) R. 350-377.

Buildings, erections, and enclosures between high and low-water marks in the harbor of Portsmouth, interrupting the flux and reflux of the tide, were abated by a decree of the court of Exchequer as a nuisance, where made under sanction of the corporation, having a grant from the crown by charter.¹ Grants of the crown for the benefit of the king, by augmenting the revenue, founded on inquisition *ad quod damnum*, must be conformable with the finding — must be for the advantage of the crown — must be acted upon promptly — must be upheld by possession and enjoyment — and the grantees must fulfil all continuing considerations, or the right of possession will not pass thereby from the crown.²

Bathing in the sea and in tide rivers, it seems, by a divided opinion in the court of King's Bench, in a modern case (*Blundell v. Catterall*, 1821),³ is held not to be so far a common right, as to justify the public in passing over land which is private property, in order to gain access to the water adjacent, for that purpose. The plaintiff in this case, who resisted the right claimed, was the lord of a manor bounded on the river Mersey, an arm of the sea. As lord of the manor he was owner of the shore under an early grant from the crown to low-water mark, and under which grant he had the exclusive right of *fishing* on

¹ *Attorney General v. Parmeter*, *sup.*

² *Ib.* And see *post*, Chap. VII.

³ *Blundell v. Catterall*, reported at length in App. p. i.

the shore with *stake nets*. The defendant was a servant at an hotel erected upon land fronting the shore, and bounded by high-water mark ; the proprietors of which hotel kept *bathing machines* for the use of persons who resorted there, who were driven by the defendant in such machines across the shore into the water for the purpose of bathing. No bathing machines had ever been used upon the part of the shore in question before the establishment of the hotel ; though it was proved, that it had been customary for people to pass it on foot, for the purpose of bathing. The defendant contended for a *common law* right for all the king's subjects to bathe on the sea-shore, and to pass over it for *that* purpose on foot and with horses and carriages. By three of the learned judges against one, it was held, that no such general right in the king's subjects to frequent the shore for the purpose of bathing existed. Best, J., was in favor of the right of the defendant ; but Abbott, C. J., and Holroyd and Bayley, Js., held, that the plaintiff should recover. The dissenting judge reasoned upon the broad grounds of the sea being the highway of the world, of the importance of a free access to it, and of the necessity of the right to bathe in it, as essential to the health of many persons. "By bathing," said he, "those who live near the sea are taught their first duty, namely, to assist mariners in distress. They acquire by bathing confidence amidst the waves, and learn how to seize

the proper moment for giving their assistance." He relied upon the authority of Bracton — *Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis*, which Bracton, said he, made part of his book, *de legibus consuetudinibus Angliæ*. The majority of the judges denied the authority of Bracton, as he had not only quoted, but interpolated his doctrine from the civil law, and they considered, that the civil law and the law of England, in respect to the passage quoted, did not agree. The topic urged at the bar, and by Mr. J. Best, of *public convenience*, met with no favor from the majority of the court, who held, that public convenience must, in all cases, be viewed with a due regard to private property, the protection whereof was "one of the distinguishing characteristics of the law of England."¹

The above case is the first in which the right of the public, by the common law, to make use of the shores of the sea for the purpose of bathing, was ever brought in question, and the decision in the case has been earnestly and ably protested against by Mr. Hall.² The silence of the books, he argues, may in some cases be alleged to testify to the extreme

¹ The argument of Mr. J. Best, drawn from *inconvenience* to the public, in being cut off from the common use of the shore for the highly beneficial use of bathing, is certainly forcible in law, — *Argumentum ab inconvenienti plurimum valet in lege*. Co. Litt. 97, 153, b.

² An Essay on the Rights of the Crown and the Privileges of the Subject, in the Sea Shores of the Realm. By Robert Gream Hall. London, 1830. See *ante*, Preface.

certainty of, and general acquiescence in, a right; and he considers the case of *Blundell v. Catterall* to be one of those cases. The right in question, he contends, was a case of *custom*, and if the practice of bathing had generally prevailed, time out of mind, throughout the realm, the silence of the books gives consent rather than denial. The authority of Bracton, he contends, to *make use* of the shore, might be deemed good authority for all such customary uses made of it as are uncontradicted by the books, and not incompatible with other unquestionable rights, or the known law of the land; and it would have been more singular if the civil and British laws had not agreed in throwing open the sea-shore, for purposes of public use, common to all mankind. Men were used to bathe and swim long prior to the written codes of Rome or England; the *custom* preceded the law, and that which Roman law may have sanctioned by book, may have been already custom, that is, *common law*, in England. In some points, respecting the use and property of the sea-shore, the Roman law and the common law of England do disagree; but this is no evidence, that they do not agree in other points; and, as they *do* agree in the common right of fishing, why may they not agree in the common right of bathing. The habit of bathing is at least coeval with fishing and navigation, two acknowledged "*common uses*" of the sea-shore. In relation to the admission of Mr. J. Holroyd, that

there may possibly be a *local* usage or custom of bathing, Mr. Hall says, — “The inhabitants of the sea-coast are, in fact, the only class of the community who *fish* in the sea, or on the sea-shore, and yet it is not a *local*, but a public and general common law right of fishing; and the custom of bathing is as general among the inhabitants of the sea-coast as fishing. It would be strange, therefore, to denominate the one custom a *general*, and the other custom, (which is at least equally general amongst the same class of persons) a *local* custom.” Such is an imperfect outline of Mr. Hall’s critical remarks upon the reasoning of the majority of the court, in *Blundell v. Catterall*; and the reader will do well to consider his line of argument in connection with the opinions of the judges constituting the majority, as given in full in the case which will be found in our Appendix.¹

The reader will bear in mind, that the title of the lord of the manor in the above case to the absolute ownership of the shore, comprehends, it was taken for granted, an exclusive right of fishing with stake nets; and, therefore, the question was, whether the private ownership of such shore, coupled with an exclusive right of fishery with stake nets, was subject to a common law right of bathing. The court, as Mr. Hall says, did not confine themselves to the

¹ App. p. i.

narrow ground of the incompatibility of the bathing with carriages, or on foot, in a place where a private fishery with stake nets, existed; but on the contrary, they decided upon the broad ground, that a general common law right did not exist at all by ancient custom, of frequenting the shore for bathing. It may be inquired, why should not a common custom of bathing upon the shore be entitled to as much respect as the common custom of fishing? There is no doubt, that the public have a right to take shell-fish on the shore, though the right of soil in the shore happens to be private property. To exclude the public from such fishing, there must be proved, besides the mere ownership of the soil of the shore, what is denominated a *several* fishery, or, in other words, a sole and exclusive right of fishery, in the riparian proprietor. Grant of the soil does not necessarily convey a peculiar privilege to fish between high and low-water mark, because all the king's subjects would have a right to fish there, unless a particular person was entitled to it by *specific* grant. A public right to dig for shell-fish in a part of the shore which had become private property was recognized in the case of *Bagott v. Orr*, in England,² and is maintained by the supreme court of Connecticut, in the case of *Peck v. Lockwood*;³ and Kent con-

¹ *Stratton v. Brown*, 4 B. & Cress. R. 485, Per Littledale, J.

² *Bagott v. Orr*, 3 Bos. & Pull. R. 479.

³ *Peck v. Lockwood*, 5 Day, (Conn.) R. 22.

siders, that the first mentioned case is virtually overruled by the case of *Blundell v. Catterall*.¹

It is very clear, that the only restraint, which by the common law is imposed upon the common liberty of bathing in tide waters, where no right of private property is involved, is that which is imposed by decency and a respect for public morals. The laws of decency must be enforced in all places which become the habitations of civilized man.² In a case in the court of King's Bench, in which the defendant was brought up for judgment on an indictment for undressing himself on the beach, and bathing near inhabited houses, that court were clearly of opinion, that the offence was a misdemeanor, and that the conviction was proper.³ It may be innocent and lawful to enjoy the recreation of sea-bathing in some places at certain times, when it would not be at other times or seasons.⁴ So it may be lawful to bathe on parts of the coast under circumstances which may subsequently alter, so as to render it no longer a lawful recreation on those spots. This was the case of the individual who was indicted for bathing in the sea at Brighton, opposite the east cliff. Until within a few years previously to the change there

¹ 3 Kent, Comm. 336.

² So ruled by McDonald, C. B., as referred to in 4 Petersdorf's Abr. (Am. Ed.) 160.

³ *Ib.* See 1 Sid. R. 168; S. C. 1 Keb. R. 690; 1 East, Pl. C. c. 1, s. 1; 2 Stra. R. 788; 1 Hawk. Pl. C. c. 5, s. 4.

⁴ Woolrych on the Law of Waters, 6.

had been no houses near the spot, and regiments of soldiers had been accustomed to bathe there. Afterwards, however, a row of houses was erected on that cliff, from which any person might be distinctly seen as he undressed himself and swam in the water. The defendant on a Sunday, in July, bathed from this spot, undressing and dressing himself upon the beach. It however did not appear, that he had been guilty of any wanton indecency, or that he exposed his person any farther than was necessary for the purpose of bathing. In his defence, it was contended, that he had not committed an indictable offence, inasmuch as he had no intention to outrage decency; and that, in fact, the inhabitants of these houses had come to the nuisance, and hence had no right to complain. It was also argued, that if the building of a house within sight of a spot appropriated to public bathing, rendered it indictable to bathe there without a machine, the poor man would soon be debarred from bathing on the southern coast of the island. The defendant was found guilty; though when brought up for judgment (as the prosecution was the first of the kind in modern times) his discharge was consented to, upon a recognition to appear when called for to receive sentence.¹

¹ Ib. And *Rex v. Crunden*, 2 Campb. R. 89

CHAPTER II.

OF THE INTRODUCTION AND APPLICATION OF THE
COMMON LAW ON THE SUBJECT IN THIS COUNTRY.
COLONIAL CHARTERS — RIGHT OF TOWNS — IN-
DIAN GRANTS — NEW STATES — FEDERAL GOVERN-
MENT.

THE territory discovered, acquired and possessed by the early English emigrants to North America, though properly no part of the *realm* of England, was yet a part of its *royalty*, or of the dominions belonging to it. The emigrants considered themselves as British subjects, and acted in that character. In the association held at Cape Cod, by the first of those who settled New England, on the 11th November, 1620, they acknowledged themselves the loyal subjects of King James.¹ They, moreover, took possession of the country in the name of the king, and made war, by his authority, with the Indians. Seeking the protection also of their native kingdom, they acknowledged and adopted the English common law, in so far as was applicable to their situation. The common law was, in fact, imported by all the English colonists;² was sanctioned both by royal

¹ Chal. 102.

² 1 Kent, Comm. 473; Ib. 343.

charters and colonial statutes, and was subsequently claimed by the congress of the United Colonies as a branch of those indubitable rights and liberties to which the respective colonies were entitled.¹ The fundamental principle of the common law, derived from the maxim of the feudal tenures, that the king was the original proprietor, or lord paramount of all the land in the kingdom, and the only source of title, continued to be recognized, until it was applied to our independent republican governments.² The rights of the crown devolved on the states by the revolution, and by the treaty of peace were confirmed to them in their sovereign capacity.³ Hence it is apparent, that, originally, not only the jurisdiction of the British sovereign extended over the territory acquired by the colonists from the native occupants, but also the same *jus proprietatis*, or right of property, in all the tide waters included by such territory, existed in the crown, to the same extent as in the tide waters of the realm, and were held like the latter (as laid down in the preceding chapter) subject to the public use; and, consequently, the soil thereof could not be exclusively appropriated

¹ Dec. of Rights, of Oct. 14, 1774, Jour. of Congress, Vol. I. p. 28.

² 3 Kent, Comm. 377; Jackson v. Ingraham, 4 Johns. (N. Y.) 163; Jackson v. Waters, 12 Ib. 365. By the Revised Stat. of New York, the people are declared to possess the original and ultimate property in all the lands within the jurisdiction of the State.

³ Bennet v. Boggs, 1 Bald. (Cir. Co.) R. 60.

by any common individual or corporation. Those individuals, for instance, to whom parcels of land were assigned, without being specially empowered so to do by the sovereign power, could claim to be proprietors only to high-water mark.¹

But inasmuch as the king by virtue of his prerogative was authorized to create *political power* in this, as in all countries newly discovered and possessed by his subjects,² the colonies, on receiving the royal charters, were invested with a *political character*, by which they succeeded to the territorial interests, which had previously belonged as *jura regalia*, to the sovereign power of the parent country. These charters were in the nature of *grants*, and were conferred by the king, on the idea that he was proprietor.³ But as they respectively created *governments*, it

¹ *Commonwealth v. Charlestown*. 1 Pick. (Mass.) R. 180. Per Daggett, J., as to the law in Connecticut: "The doctrine of the common law is, that the right to the soil of the proprietors of land on navigable rivers, extends only to high-water mark; all below is *publici juris* — in the king, in England. That is the law of Connecticut; for we have no statute abrogating it: — It was the law brought by our ancestors, it is our law; the soil being not indeed owned by the king, but by the state." *Chapman v. Kimball*, 9 Conn. R. 40.

² Cowp. Rep. 213.

³ The colonial governments of this country were of three kinds: First, *Charter governments*, by which the powers of legislation were vested in a governor, council, and assembly, chosen by the people. Of this kind were the governments of Rhode Island and Connecticut. Secondly, *Proprietary governments*, in which the proprietor of the province was governor; who generally resided in England, and administered the government by a deputy of his own appointment; the as-

is to be observed, they were not construed as his other grants were ; that is, as not excluding arms of the sea, &c., but as including them. And it was thus that the governments of the several colonies were invested with sovereign authority, delegated by the crown, to alter the common law in respect to their tide waters, or to grant an exclusive property therein at their discretion.

The right in the waters and shores of the sea passed from the crown, by letters patent from James I., to the council established at Plymouth, in the county of Devon, for the planting, &c. of New England, and from that council so much of their territory thus acquired, as was contained in the colony of Massachusetts Bay, was transferred to the company who undertook the settlement of that colony. This transfer to that colony was confirmed by the charter of King Charles I., which constituted the company a body corporate and politic, giving them absolute property in the land within the limits of the charter, the power of making laws for the government of the colony, and full dominion over all the ports, rivers, creeks, and havens, &c., in as full and

sembly only being chosen by the people. Such were the governments of Pennsylvania and Maryland, and originally of New Jersey and Carolina. Thirdly, *Royal* governments, where the governor and council were appointed by the crown, and the assembly by the people. Of this kind, were the governments of New Hampshire, Massachusetts, New York, New Jersey (after the year 1702), Virginia, the Carolinas (after the resignation of the proprietors in 1738), and Georgia.

ample a manner as they were before held by the crown of England. The company to whom that charter was made, having assumed a political capacity, and being made a commonwealth, exercised dominion over all the land within the limits of the charter, and all the privileges and immunities and franchises connected with it, as public property, parcelling it out into townships, or smaller divisions, for the purpose of settlement. By virtue, in fact, of the grant from the Plymouth company, the charter of king Charles, and actual possession and disposition of the territory, the people of the colony, in their politic capacity, succeeded to all the territorial rights, franchises, and immunities, which had ever belonged to the crown of England. The exceptions and provisions of the colonial ordinance of Massachusetts of 1641, clearly show, that the principles of the common law relating to this kind of property, were well understood by the colonial legislature.¹

In Maryland, the doctrine is laid down by the courts of that state, that originally the king of England had a right to grant the land covered by tide water, *subject to the common rights of fishing and navigation*; that the former proprietors of Maryland acquired the same right of disposing of land covered by tide water within the province, subject to the

¹ See opinion of the Supreme Court of Massachusetts, delivered by Parker, C. J., in *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. (Mass.) R. 180.

same restriction, under the charter by which the province was granted to them by the king, as the king had prior to the charter; and that this right was now vested in the state of Maryland.¹

¹ *Browne v. Kennedy*, 5 H. & Johns. (Md.) R. 195; *Wilson v. Inloes*, 11 G. & Johns. (Md.) 351. The 4th section of the charter to Lord Baltimore has these words:—"Also we do grant and likewise confirm, unto the said Baron of Baltimore, his heirs and assigns, all islands and islets within the limits aforesaid, and all and singular the islands and islets from the eastern shore of the aforesaid region, towards the east, which have been, or shall be, found in the sea, situate within ten marine leagues from the said shore; with all and singular the ports, harbors, bays, rivers and straits, situate or being within the metes and bounds, and limits aforesaid, with the fishings of every kind of fish," &c. : with a saving in the 16th section to the king, and his successors, and to all the subjects of the kingdoms of England and Ireland of the liberty of fishing for sea-fish, &c. The language of the 4th section is too plain and explicit to admit of any doubt, and is strengthened, rather than weakened, by the saving in the 16th section, and clearly passed the property in the soil, covered by any of the waters within the limits of the charter, to the Lord Proprietary; who, thus become owner of the soil, subject to the common rights of fishing and of navigation, had full power and authority to dispose of it. Per Buchanan, J., in *Browne v. Kennedy*, *sup.* See also *Smith et al. v. State of Maryland*, 2 H. & M'Hen. (Md.) R. 244; *Harrison v. Sterret*, 4 Ib. 540. The Proprietary of Maryland held the dominion of Maryland and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary, legal and equitable rights, as in the hands of any other person. *Howard v. Mole*, 2 H. & Johns. (Md.) R. 249. The Proprietary continued in possession of all the vacant lands until the acts of confiscation, which vested the right to those lands, and the actual seisin and possession in the state, and the state's possession continued until the lands were granted. *Cockey's Lessee v. Smith*, 3 H. & Johns. (Md.) R. 20.

In the case of *Martin v. Waddell*, in the supreme court of the United States, it was adjudged that the tide waters, and the soil flowed by the same, in East New Jersey, passed to the duke of York by virtue of the charters granted to him by his brother King Charles II., in 1664 and in 1674, as one of the royalties incident to the powers of government, and were held by him in the same manner and for the same purposes, that such waters and the soil under them are held by the crown. The whole of the duke of York's interest therein, including the royalties and powers of government, were conveyed to the proprietors of East New Jersey, as fully, and in a condition as precisely the same, as they were granted to him ; and those proprietors had both the same dominion and the same right of property in such waters and the soil under them, and in the fishery, that had belonged to him under the original charter, being held by those proprietors as a *prerogative* right, and incident to the *regal* authority. The surrender by the proprietors, in 1702, to queen Anne, and her heirs and successors, according to its evident object and meaning, restored to the crown, in the same plight and condition, whatever the duke of York held as a royal prerogative right, with the political power to which it was incident. When the *people* of New Jersey took possession of the reins of government, and took into *their* hands the powers of *sovereignty*, the prerogatives and *jura regalia*, which

before belonged either to the crown or the parliament, became immediately and rightfully vested in the *state*. And the court recognized the decision of the supreme court of New Jersey, in *Arnold v. Mundy*,¹ which was to the same effect, and regarded it as conclusive, as against proprietary rights to the soil under tide waters, and the fisheries therein.² Independently, however, of that case, a majority of the supreme court of the United States were of opinion, that the true construction of the charter granted by Charles II. to the duke of York, was intended as a delegation of sovereignty, or as a frame of government; and that, as it was no appropriation of the public domain, the proprietors were never, by virtue thereof, entitled to the rights in question, viz. the right of property in the soil flowed by the tide, and an exclusive right of fishing for oysters.³

When the colonial charter of Massachusetts was annulled, the common law, in respect to the sover-

¹ *Arnold v. Mundy*, 1 Halst. (N. J.) R. 1.

² *Martin et al. Plaintiffs in error v. Waddell, Defendant in error*, 16 Peters (U. S.) R. 367; App. p. xli.

³ Thompson, J. and Baldwin, J. dissented from the opinion of the court, and the former delivered an elaborate opinion, in which he attempted to show that the grant of Charles II. to the duke of York passed the title to the land under the water as private property; that by the conveyance of the duke of York, all the right and title, both of soil and the powers of government, vested in the Proprietors, and that the Proprietors, by their surrender to the crown, did not relinquish any rights of private property in the soil derived from the original charter. See App. p. xcv.

eign and public right to arms, &c. of the sea, and to the soil flowed by the same, was maintained at the revolution. Upon that event, the *jura regalia* which before had belonged to the crown, became immediately vested in the state.¹ In the case of the *Inhabitants of Arundel v. M'Culloch*, in that state, the court declare it as unquestionable, that all tide waters belonged to the sovereign, or in other words, to the public ; and that no individual can appropriate them to his own use, or confine or obstruct them ; and that it was upon this principle that legislative acts had been passed authorizing the building of bridges.² Parker, C. J., in *Commonwealth v. Charlestown*, asserts the law to be (unless so far as it has been altered by statute) " that all arms of the sea, coves, creeks, &c., where the tide ebbs and flows, are the property of the sovereign, unless appropriated by some subject, by virtue of a grant, or by prescriptive right, which is founded on the supposition of a grant."³ It has ever to this day, in fact, been considered, that when the revolution took place, the people of the several original states became themselves sovereign, and that, in that character, they held the absolute right to all their tide waters, and the soil under the same, for their own common use.⁴

¹ See Dane's Abr.

² *Inhabitants of Arundel v. M'Culloch*, 10 Mass. R. 70.

³ *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180.

⁴ *Martin et al. v. Waddell*, 16 Peters (U. S.) R. 410 ; App. p. xli ; *Bennet v. Boggs*, 1 Bald. (Cir. Co.) R. 60.

The supreme court of Pennsylvania say, that the soil between low water and the ordinary high water of the ocean, and wherever the tide ebbs and flows, is a part of the common highway, vested, they say, in England in the king, but in Pennsylvania, in the state.¹ Land on the navigable rivers of that state between high and low-water marks, are not within the jurisdiction of the *land office* of the state, so as to be the subject of grant by warrant, survey and patent from the Proprietary, dated in 1684.² It is no uncommon thing to find springs between high water and low water along the banks of the river Susquehanna, and though such aqueous appendages are often a matter of convenience at some seasons of the year to those who live near, yet the state never sold any land below high-water mark.³ The common law of England, generally, except in the state of Louisiana, where the civil law prevails, upon this subject, is in fact recognized in every state,⁴ though (as we shall have occasion to point

¹ Ball v. Slack, 2 Whart. (Penn.) R. 539.

² Freytag v. Powell, 1 Whart. (Penn.) R. 536.

³ Commonwealth v. Fisher, 1 Penn. R. 467.

⁴ See 2 Dane's Abr. 692, sec. 13. Note of the American editor in Vol. 44 Law Library, p. 146; Scott v. Wilson, 3 N. Hamp. R.; Parker v. Cutler, Mill Dam Company, 2 App. (Me.) R. 353; Hollister v. Union Company, 9 Conn. R. 436; Chapman v. Kimball, Ib. 38; East Haven v. Hemingway, 7 Ib. 186; Collins v. Benbury, 3 Ire. (N. C.) R. 277; Rogers v. Jones, 1 Wend. (N. Y.) R. 237; Commissioners of Canal Fund v. Hempshall, 26 Ib. 404; Hays v. Bowman, 1 Rand. (Va.) R. 417; Meade v. Haynes, 3 Ib. 33; Pitkin v. Olmstead,

out in subsequent chapters) it has in some of them been altered and modified by statute and usage.

Accordingly it is well settled also, that no separate and exclusive right adverse to this sovereign and public right is acquired by a *town* to the tide waters or the soil thereof, by virtue of an act of the legislature extending the limits of such town over such waters.¹ The supervisor of the town of Flushing, in the state of New York, brought an action of debt for a penalty prescribed by a regulation of the town, by which it was ordered that no person should rake clams within the boundary of said town, and the decision of the court was, that the town had no right to pass the law in question. "The town of Flushing" they said, "must show a *right of property* to the lands in the bay, in order to entitle them to make rules and regulate the use of these lands. We will not presume a grant of land under navigable waters to the owners of the adjacent soil, without evidence of long exclusive possession and use to warrant such presumption. No grant has been shown, nor was any fact proved, from which a grant was to be presumed. The act of extending the

1 Root (Conn.) R. 217; Holme v. Richards, 4 Call (Va.) R. 441; Boatwright v. Bookman, 1 Rice (S. C.) R. 447. Common law in relation to the subject also recognized in Illinois, where it is held not applicable to the river Mississippi above the raising of the water occasioned by ocean tides. Middletown v. Pritchard, 3 Scam. (Ill.) R. 520.

¹ Austin v. Carter, 1 Mass. R. 231.

bounds of the town over the bay and into the Sound or East river, so as to include the islands southward to the main channel, was merely for the purpose of *jurisdiction*, and is no evidence of a grant of property in the soil covered by the water. All the ground, under the navigable waters of the Hudson river, is within the boundaries of some town, for the purposes of civil and criminal jurisdiction; but it does not follow, that the lands under the water, belong to the towns situated on the river."¹ And thus it is, that no authority is given by a statute of the state of Massachusetts under which highways are to be laid out, to the selectmen of a town, to appropriate the shores, or flats subject to be flowed by tide water, to the use of the inhabitants of the town, in the form of a way or road.² The attempt, say the court in this case, to convert a wharf into a town-way, effectually showed the wisdom of withholding such powers from towns.

But, as is very well known, there are instances of grants made by the *native Indians*, and before charters from the crown were conferred, which grants embraced territory that included arms of the sea, so that a right of property therein, it has been supposed, was derived by the grantees independently of the crown. It was not at all unusual, at the period of

¹ *Palmer v. Hicks* (in error), 16 Johns. (N. Y.) R. 133.

² *Keen v. Stetson*, 5 Pick. (Mass.) R. 492.

the settlement of this country by European emigrants, for them to purchase of the natives extensive territorial districts. Such purchases were, however, dictated by policy merely, or with the view of avoiding hostilities; for the purchase made by William Penn, which was among the most remarkable transactions of the kind, was not supposed to augment the title he had acquired by discovery.¹ All the treaties and negotiations, moreover, between the powers of Europe and the American continent, from the treaty of Utrecht, in 1713, to the treaty of Ghent, in 1814, have uniformly recognized the principle just mentioned, and have utterly disregarded the supposed right of the native Indians to the territory within their asserted jurisdictional limits. Those natives were not regarded as forming civil communities, who had that fixed and permanent property in the soil which admits of alienation to private individuals.² In the elaborately discussed case of *De Armas v. Mayor, &c. of New Orleans*,³ it was admitted to be

¹ *Penn v. Lord Baltimore*, 1 Ves. R. 445.

² An. Reg. 56, 223; Niles' Reg. 229; 2 Ruth. Inst. 29; Jefferson's Notes, 126; Smith's Hist. New York, Montesq. Spirit of Laws. Baldwin, J., in *Mitchell v. United States* (9 Peters, R. 176), said, that purchases made at Indian treaties, under the competent sanction of the government of the United States, vest a valid title in the purchaser, without any patent. This opinion is, however, so contrary to previous authorities on the subject, that "I," says Kent, "should apprehend it would be proper for further consideration." 3 Kent, Comm. 378, (note.)

³ *De Armas v. Mayor, &c. of New Orleans*, 5 Mill. (Louis.) R. 132.

uniformly the practice of all European nations having colonial establishments and dominion in America, to consider the unappropriated lands occupied by savages, and obtained from them by conquest or *purchase*, to be crown lands, and capable of a valid alienation, by sale or gift of the sovereign, and by him only. No valid title could be acquired without letters patent from the king. It was declared by the statute of Connecticut of 1718, that no title to land was valid unless derived from the governor and company of the colony.¹ What, however, is completely decisive in respect to this matter, is the case of *Johnson v. M'Intosh*, in the supreme court of the United States. In this case the validity and effect of simple Indian grants was very fully discussed, and it was therein deliberately determined, that a title to lands by virtue of grants made by Indian tribes or nations, could not be recognized in the courts of this country.² Indian grants have likewise been held in the state of New York, as not affording that color of title which is necessary to create a right by virtue of possession.³

As to the effect then of a *recognition* and *confirmation* of Indian grants by the crown, or by a colonial

¹ Rev. Stat. of Conn. 1784, p. 113.

² *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 511. See likewise *Worcester v. State of Georgia*, 6 Peters (U. S.) R. 512.

³ *Jackson v. Hudson*, 3 Johns. (N. Y.) R. 394; *Jackson v. Porter*, Paine's (Cir. Co.) R. 457.

legislature deriving political powers, by charter, from the crown.

In the preamble of an act of the general assembly of the colony of Rhode Island, passed at Newport, in May, 1682, it was stated, that whereas in the fifteenth year of Charles II. there was a charter granted to the colony, and that amongst the many privileges granted by it, there was granted to the general assembly of the colony power and authority to make and ordain laws, suiting the nature and constitution of the place ; and in particular, "to direct, rule, and order *all matters relating to purchases of lands of the native Indians* ;" and that the general assembly taking into serious consideration, that the lands of the several towns of Newport, Providence, Portsmouth, Warwick and Westerly were purchased (by the inhabitants thereof) of the native Indians, chief sachems of the country, before the granting of the said charter, so that an order or direction from the said assembly could not be obtained therein, and it being found necessary for the reasons aforesaid, that the lands of the aforesaid towns should be by an act of the general assembly, *confirmed* to the inhabitants thereof, according to their several and respective rights and interest therein ; it was therefore enacted, that all the lands lying within the towns mentioned, according to their several respective purchases thereof of the Indian sachems, be "*allowed of, ratified, and confirmed* to the proprietors of each of the aforesaid

towns, and to each and every of the said proprietors, their several and respective rights and interests therein, by virtue of any such purchase or purchases as aforesaid; *to have and to hold* all the aforesaid lands, by virtue of the several purchases thereof, with all the appurtenances, privileges and commodities thereunto belonging, or anywise appertaining, to them the said proprietors, their heirs and assigns forever, in as full, large, and ample a manner to all intents, constructions and purposes whatsoever, as if the said lands, and every part thereof, had been purchased of the Indian sachems, by virtue of any grants or allowance obtained from the general assembly of this colony, after the granting of the aforesaid charter.”¹

No construction of the ratification and confirmation of Indian grants as above set forth, can be given, consistently with the opinion of the majority

¹ “Acts and Laws of His Majesty’s Colony of Rhode Island and Providence Plantations, in America,” p. 35. This was the first printed edition of the Rhode Island Laws. It was printed in 1719, and contains the acts of the general assembly, beginning with the March session 1663, and ending with the May session, 1718. In the same volume, p. 45, there is the following act, of 1700, entitled, “an act for putting in force the Laws of England,” viz. — “That in all actions, matters, causes and things whatsoever, where no particular law of this colony is made to decide and determine the same; that then, and in all such cases, the laws of England shall be put in force to issue, determine and decide the same: Any usage, custom or law to the contrary hereof notwithstanding.” (Passed at Newport, 30th April, 1700).

of the court in *Martin v. Waddell*,¹ other, than that the grantees should be entitled to the territory granted, agreeably to the common law of England; that is, that their title in the soil extended only to high-water mark.

On the application of the proprietors and inhabitants of the town of New Haven, in Connecticut, for a patent of the confirmation of the lands, with their appurtenances, within certain boundaries particularly specified, which they had obtained by purchase of the Indian native proprietors, and whereof they had stood seised and been in quiet possession for many years without interruption, the general assembly of the colony of Connecticut, in 1685, for a more full confirmation of the premises unto the said proprietors and inhabitants of the town of New Haven, in their rightful possession and enjoyment of the same, ratified and confirmed unto them, the premises so butted and bounded with all the meadows, &c., and with all *ports, rivers, fishings, &c.*, on or within the premises, and all other commodities, privileges, franchises, and hereditaments whatsoever thereunto belonging, or in any ways appertaining to any part or parcel thereof. Within the boundaries of the premises was an arm of the sea called "Dragon" river, navigable for large vessels. It was held, that this was not only a confirmation, but a grant of

¹ *Martin v. Waddell*, 16 Peters (U. S.) 367; App. p. xli.

title, but that nevertheless, the soil between high and low-water mark of "Dragon" river was not thereby granted.¹ The acknowledged Indian proprietors of Middletown, in Connecticut, granted by deed, in 1762, a tract of land, within certain described limits. It was held to be questionable whether a portion of the river Connecticut, and of that part of it which is an arm of the sea, was included within the boundaries mentioned in the Indian deed; but if it was included, the soil of the river was not conveyed.²

The next question is, whether the *new* states of the Union, or those which have been admitted since the revolution, stand upon the same footing as the *original* states; or whether the sovereign right of property in the tide waters within the jurisdictional limits of a new state, is transferred to the state government, or remains in the general government. The question was raised in the *City of Mobile v. Eslava*,³ which came up to the supreme court of the United States from a writ of error to the supreme court of the state of Alabama, but the case went off in the first mentioned court upon another point. The supreme court of Alabama did not give a construction of the act of Congress, of 1824, under which the plaintiff claimed; but considered the

¹ *East Haven v. Hemingway*, 7 Conn. R. 186.

² *Middletown v. Brace*, 8 Conn. R. 222.

³ *City of Mobile v. Eslava*, 16 Peters (U. S.) R. 247.

respective rights and powers of the federal and state governments arising under the federal constitution, and the compact entered into on the admission of the state of Alabama into the Union. They considered the power of the Spanish monarch over the soil and navigable waters when the territory was under his dominion; and examined the doctrine of the common law as applicable to the subject; and by a course of reasoning thus directed, they decided, that the act of Congress, of 1824, was void, as Congress had no power to grant the property in dispute. They say — “The original states possessing this interest in the waters within their jurisdictional limits, the new states cannot stand upon an equal footing with them, as members of the Union, if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers; and they declared their opinion to be: First, That the navigable waters within the state of Alabama have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same. Second, The navigable waters extend, not only to low water, but embrace all the soil that is within the limits of high-water mark. Third, By the acts of Congress, regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters, and the soil covered by them.

Fourth, The original states, in virtue of their royal charters, are entitled to the navigable waters within their territory, while the public are only entitled to an easement, to be provided for under that provision of the constitution which authorizes Congress to regulate commerce, &c. Alabama is admitted into the Union on an equal footing with the original states ; and, of consequence, is entitled to the right of property in the tide waters within its limits. Fifth, By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the right of the United States, except so far as it was reserved by the federal constitution in some of its grants, or its retention was necessary to enable Congress to exercise its delegated powers.¹

¹ Though the case went off in the supreme court of the United States upon another point, it was admitted by Mr. J. Catron, in the opinion he delivered, as certain, that the original states, acquired by the revolution the rights of soil and of sovereignty. But he added — “ If it be true, that Alabama was admitted on an equal footing in regard to the rights of soil with the original states, she can hold the high lands with the land covered by navigable waters ; and so can nine other States equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a *common fund* of the Union.” The clause inserted in the constitution of Alabama, said the learned judge, reserving the rights of property to the United States, as a compact with them, embraces lands under water as emphatically as those not covered by water. But, said he, if no stipulation had been made, saving the interest of the United States, they would have just as much right to their private property as an individual had to his. She held, in fact, as a cor-

The question was raised in two other cases in the supreme court of the United States, from the state

poration holds, an individual title. Nor did Congress cede their claim to the public domain by stipulating, that the navigable rivers should be highways. That such waters are common for the purposes of navigation and commerce, in the widest sense, is free from doubt; and that Alabama has *jurisdiction* and power of them, the same as the original states, is equally clear. Yet it does not follow, that the fee of the shores, banks, and soil under water, was in the state of Alabama. The United States, as owner, could do no act to obstruct the free public use of the waters, more than a private owner of the soil, under water, could obstruct the navigation. The learned judge compared the case to that of an individual owner in fee of the bottom of a navigable river, who can cultivate and take out the shell-fish, or the minerals from the bed; nor, said he, could it be doubted the United States may pursue beds of silver, tin, lead, or copper, under the bottom of a bay, the river Mississippi, or a great lake; although they could not impede in any degree their navigation. So might the lessees, or assignees of the United States do the same. The importance of the question in this case appears from the following extract we make from the opinion of Mr. J. Catron. — “The Delta of Mississippi, the greater part of East Florida, much of Alabama, and also of the state of Mississippi, have lands covered slightly with the flow of high water. Those lands are subject to be redeemed by embankments; they amount to some millions of acres; many of them are of the best rice, indigo, and even sugar and cotton lands on this continent. Immense bodies of land are flowed by the great lakes, and subject to be redeemed; and yet more, many parts of the shores of the great river Mississippi, from the mouth of the Missouri, to the ocean, are annually flowed by a tide of its own; and the lands are redeemed by levees from the water until the vessels on the surface of the river float above redeemed plantations that have been submerged for months every year; and that was submerged in 1819, when it is supposed the United States, by implication, ceded all the flowed lands within her limits to Alabama. Embankments to exclude water are almost as common on the Mississippi river, and in the delta of country embraced by its mouths, as are fences in other parts of the country to protect the crops from animals; and it is not in the

of Alabama,¹ but they also went off upon other points. At length, however, it was expressly determined by the supreme court of the United States, at the January term, 1845,² that the power of Congress over navigation, and its power to make all needful rules and regulations for the sale and disposition of the public lands, conferred no power to grant land in Alabama which was below usual high-water mark, at the time Alabama was admitted into the Union. That the shores of navigable waters, and the soil under them, were not granted by the constitution to the United States, but were reserved to the states respectively ; and that the *new* states have the same rights, sovereignty and jurisdiction over the subject as the *original* states. Upon the admission of Alabama into the Union, the right of eminent domain, which had been temporarily held by the United States, passed to the state. The stipulation con-

reach of probability, or of belief, that Congress, by an oversight, surrendered all flowed lands to the states in which they lie ; or, that it was intended to cede to the new states the right to prohibit the construction of forts and defences, by the United States, on the public lands below high-water mark. I imagine it never occurred to any one, that a purchase of the soil from the state of Louisiana was necessary before works within the flow of tide-water could be constructed for the defence of the mouths of the Mississippi river. The idea is new ; and the consequence leading to such a consequence, startling."

¹ *City of Mobile v. Hallett*, 16 Peters (U. S.) R. 261 ; *Pollard's Lessee v. Files*, 2 How. (U. S.) R. 591.

² *Pollard's Lessee v. Hagan*, 3 How. (U. S.) R. 212. See App. p. cxiv.

tained in the 6th section of the act of Congress, passed on the 2d of March, 1819, viz.: "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state," conveyed no more power over the navigable waters of Alabama, to the government of the United States, than it possessed over the navigable waters of other states, under the provisions of the constitution. The United States now hold the public lands in all the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have received by compact with the new states for that particular purpose. "To give," says Mr. J. McKinley, who gave the opinion of the court, "to the United States the right to transfer to a citizen the title to the shores and the soil under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of *state sovereignty*, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign

power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, and the laws which shall be made in pursuance thereof." And the judgment of the supreme court of Alabama was affirmed;— Mr. J. Catron dissenting.

The right of eminent domain of *all* the states over the tide waters and the soil under them, within their respective territorial jurisdictions, is undoubtedly subject, to a limited extent, to the power of the general government of the United States. It cannot be exercised in a manner repugnant to the constitution of the United States, in the following particulars: 1. To the eighth section of the first article, which grants to Congress the power to regulate commerce among foreign nations, and among the several states. 2. To the second section of the fourth article, which declares, that the citizens of each state shall be entitled to all the privileges of citizens in the several states. 3. To the second section of the third article, which declares, that the judicial power should extend to all cases of admiralty, and maritime jurisdiction. Commerce with foreign nations, and among the several states, means intercourse with those nations, and among those states, for purposes of trade; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land. It is this intercourse

which Congress is invested with the power of regulating, and with which no state has a right to interfere.¹ A relinquishment of this power by the states might be fairly deduced from the very act of confederation. But it was settled in the case of *Gibbons v. Ogden*, in the supreme court of the United States, that the acts of the legislature of the state of New York, granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that state, for a term of years, with boats moved by steam, are repugnant to the clause in the constitution of the United States, which authorizes Congress to regulate commerce, and the acts of Congress regulating the coasting trade made in pursuance of the constitution. The constitutional power of the federal government to regulate commerce, it was adjudged, also extended to navigation carried on by vessels exclusively employed in transporting passengers.²

But the power of Congress, which comprehends the use of, and passage over, the navigable waters of the several states, by no means impairs the right of

¹ *Cornfield v. Coryell*, 4 Wash. (Cir. Co.) R. 371; *Bennet v. Boggs*, 1 Bald. (Cir. Co.) R. 60.

² *Gibbons v. Ogden*, 9 Wheat. (U. S.) R. 1. By the decision in this case, the one made by the court of Errors in the state of New York, on appeal from the court of Chancery of that state, was reversed. See *Gibbons Appellant v. Ogden Respondent*, 17 Johns. (N. Y.) R. 488, and see 4 Johns. (N. Y.) Ch. R. 450, and *Livingston v. Van Ingen*, 9 Johns. R. 507. See *Gibbons v. Ogden*, recognized in *Pollard's Lessee v. Hagan*, 3 How. (U. S.) R. 229.

state governments to legislate upon all subjects of internal police within their territorial limits, which is not prohibited by the constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do not interfere with the regulations of Congress upon the same subject.¹

In a case in the supreme court of the United States, in 1829, the question was considered and decided, whether an act of the legislature of the state of Delaware, incorporating a certain company, was repugnant to the constitution of the United States, in so far as it authorized a dam across a salt water creek, in which there was, it was alleged, a certain common and public way, in the nature of a highway, for all the citizens both of the state of Delaware and of the United States, with sloops or other vessels, to navigate, sail, pass and repass over, at all times. It appeared, that the defendants, who were the owners of a certain sloop, licensed and enrolled according to the navigation laws of the United States, broke and injured the dam erected by the company; and that therefore an action of trespass *vi et armis*, was instituted against them in the supreme court of the state of Delaware, who gave judgment for the plaintiffs, which judgment was approved by the court of appeals of the state. It was then brought before the su-

¹ Cornfield v. Coryell, 4 Wash. (Cir. Co.) R. 371.

preme court of the United States by the defendants, for its review. The counsel for the plaintiffs in error insisted, that it came in conflict with the power of Congress "to regulate commerce with foreign nations, and among the several states." The opinion of the court was delivered by Marshall, C. J., who said, — "The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows and re-flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." Had Congress, said the learned judge, "passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those

small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states ; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and between the states, a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”¹

The oyster law of the state of New Jersey, which declares, that no person residing in, or out, of the state, shall at any time dredge for oysters, in any of the bays or waters of the state ; and also, that no person who is not an inhabitant and resident of the state shall gather oysters in any of such waters, on board of any vessel not wholly owned by some person, inhabitant of, or actually residing in, the state, under the penalty of ten dollars, and forfeiture

¹ *Wilson, &c. v. Black Bird Creek Marsh Company*, 2 Peters (U. S.) R. 245. This case was cited by the supreme court of Indiana with approbation in the case of *Cox v. The State*, 3 Black. (Ind.) R. 197.

of the vessel, &c. employed in the commission of such offence, is not repugnant to any of the above named provisions of the constitution of the United States.¹ A statute of the state of New Hampshire, regulating the mode of rafting and driving timber down the Connecticut river, was held not to be a regulation of commerce among the several states, within the meaning of the constitution.²

Hence the states, in reference to their right of property in the tide waters which were within their jurisdictional limits, correspond, in reference to the control of the general government, to individuals who have acquired an exclusive property in the soil covered by an arm of the sea by a grant from the state. In such case, the public are entitled to an easement in such arm of the sea for the transportation of goods, merchandise, and passengers, in boats and vessels; and the sovereign power of the state may by law prescribe rules and regulations to preserve this public easement unimpaired. No appropriation of the soil can be made, however, except by the grantee of the soil himself; but the grantee cannot so exercise his right of property as to obstruct or render inconvenient the navigation, any more than a person who has the fee simple of a road can obstruct or annoy the passing over it. As it is expressed by

¹ *Cornfield v. Coryell*, 4 Wash. (Cir. Co.) R. 371.

² *Scott v. Wilson*, 3 N. Hamp. R. 321.

Lord Hale, the *jus privatum* is subject to the *jus publicum*.¹ The *jus privatum* of each state in its tide waters is subject to the *jus publicum* of the United States, and of the people of the United States, which is a free and uninterrupted passage to the people of every state. The states have authority to pass all laws to regulate the tide waters and the soil under them, within the jurisdiction of the sovereignty which their governments may deem useful or expedient, if they do not come into collision with any law made by Congress in virtue of the constitutional powers which have been mentioned, with which Congress is invested.

¹ Hale, *De Jure Maris*, Harg. Tracts, 32.

CHAPTER III.

"SHORE," "HIGH-WATER MARK," AND "NAVIGABLE RIVER" DEFINED.

HAVING shown, that by the common law as expounded and settled in England, and as recognized and applied by the judicial tribunals in the United States, the right of property in tide waters, and in the soil under their surface, is *prima facie* in the sovereign, and held subject to the right of use of the public, or *jus publicum*; in order to determine the exact limits of this sovereign and public right, it next becomes necessary to consider what, in legal acceptation, is understood by the terms "shore," "high-water mark" and "navigable river."

A learned legal writer has thought proper, in describing what is meant by the shore, to introduce the verse from the 13th chapter of St. Matthew, wherein it is said, that our Saviour "went into a ship and sat there, and the whole multitude sat on the shore." From this passage the writer infers, 1st, that the shore was the *dry land*, because they sat thereon; 2d, that it was a great quantity of ground, for there was a multitude of people; 3d, that it was near the brink of the water, because

they heard Jesus speak unto them from the ship.¹ This mode of proving a legal argument, it has been said, is not so much followed now as in the quaint times in which the learned "reader" on Sewers lived and argued; and it may be observed, that, as it was a *lake*, without tides, on which Jesus embarked, it could not properly be said to have a "shore," according to our legal understanding of that term; it had "*ripam*," but not "*littus*."²

By the civilians the "sea-shore" was denominated *littus maris*; so that both the English and Latin names appear to be derived from the sea itself, as participating *more* of its nature than of the land, though it certainly participates in some degree of each.³ In legal construction, it is that space of land which is alternately covered and left dry, by the rising and falling of the tide. In other words, it is the space which is between the high and low-water marks.⁴ This space is sometimes called, instead of "shore," the "strand," and sometimes the "beach," and it has been construed, that the word "beach," in a statute, was intended to be applied to such space.⁵

¹ Callis in his Reading on the Statute of Sewers.

² Hall's Rights to the Sea, &c.

³ Sir Henry Constable's case, 10 Co. R. 107.

⁴ Hale, *De Jure Maris*, Harg. Tracts, 12; *Blundell v. Catterall*, 5 B. & Ald. R. 91; App. p. i.

⁵ *Cutts v. Hussey*, 3 Shep. (Me.) R. 237. And see *Pollard's Lessee v. Fells*, 2 How. (U. S.) R. 607; *Phillips v. Rhodes*, 7 Met. (Mass.) R. 322.

The question then is, what is to be considered as "high-water mark?" it being well known that the tides rise much higher upon some occasions, and at some seasons of the year, than at others. The law takes notice of three kinds of tides, viz. 1. The *high* spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials; 2. The *spring* tides, which happen twice every month, at the full and change of the moon; 3. The *neap*, or *ordinary* tides, which happen between the full and change of the moon, twice in twenty-four hours. Relatively speaking, it would seem, that the spring tides, though *periodical*, can scarcely be denominated "*ordinary*," when there are other tides which take place daily, and more regularly, viz. the *neap* tides. Besides, the land subject to spring tides, is, for the greater part of the year, dry land.¹ The civil law, in respect to the *terra firma*, and the title of the riparian owners, differs from the common law. By the former, high-water mark is determined by the highest tides, and the shore, it is understood, includes the land, as far as the greatest wave extends itself in the winter, — *Est autem littus maris, quatenus hibernus, fluctus maximus excurrit*, according to the Institutes;² and according to the Digest, *Littus publicum est eatenus qua maxime fluctus ex-*

¹ Hale, *sup.* 25, 26; Hall's Rights to the Sea, &c. 9.

² Inst. L. 2, T. 1, s. 3.

astuat.¹ By the law of Scotland on the subject, it was adjudged in the House of Lords, in 1839, that the mouth of a river, *ostium fluminis*, comprehends the whole space betwixt the lowest ebb and the highest flood mark.² The civil code of Louisiana conforms to the civil law.³ The ordinance of Louis XIV. provides, that "all the space which is covered and discovered by the new and full moon, and as far as the tide extends at the high flood of March, shall be reputed to be the sea-shore."⁴

On the other hand, the law laid down, as the English common law, by Lord Hale and other writers, is, that the soil which is overflowed by high spring tides, or by extraordinary tides at any time, does not properly come under the denomination of shore; and consequently, the sovereign and public right is not of that large extent. Hale states the rule of the common law to be, that the shore is that land only which is usually overflowed by *ordinary* tides; and he further states it to have been so expressly adjudged in the exchequer chamber about 12 Car. I., on prosecution by information of certain lands in the county of Norfolk; and again, in Sir Edward Heron's

¹ Dig. L. 50, T. 16, s. 112.

² *Horne v. Mackenzie*, 6 Clark & Finn. R. 628. Several Scotch cases, therein cited.

³ Art. 4, Civil Code Louisiana, — "By sea-shore we understand the space of land upon which the waters of the sea are spread in the highest water during the winter season."

⁴ Cited by Callis in his work on Sewers.

case, 15 Car. I. (B. R.) ; and again, in an *ejectione firmæ* for the town of Cowes in the Isle of Wight, 17 Car. II.¹ The law as thus stated, has been recognized in the modern case of *Blundell v. Catterall*.² By an act of parliament reciting, that a certain tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title, might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of said tract of land, called Lipson bay, was granted to a company for that purpose. On one side of the bay was the northern side of a private estate, called Lipson ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed, and were covered by the high water of the ordinary *spring tides*, but not by the *medium tides*. It was held, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and did not, therefore, pass to the

¹ Treatise, *De Jure Maris*; and Hall on the Rights to the Sea, &c. 9.

² *Blundell v. Catterall*, App. p. i.; *Ball v. Slack*, 2 Whart. (Penn.) R. 508; and see 4 Mason, (Cir. Co.) R. 345.

embankment company by the act in question. The act made mention in its recital, it will be observed, of land *daily* "overflowed by the sea," and assuming, said Lord C. J. Tenterden, those words mean only land *ordinarily* overflowed by the sea, still the recesses in question did not come within that description. The land in question, said Park, J., was above the *ordinary* high-water mark, and therefore the plaintiffs could not entitle themselves to it under the crown.¹

The common law on the subject, as above stated and expounded, is recognized in this country by the highest authority.² One of the questions in the case of *Storer v. Freeman*, in the supreme court of Massachusetts,³ was as to a boundary designated in a conveyance as a line running to the *shore*, and thence *by the shore*; and it was whether the land, (by virtue of such description) was conveyed, between high and low-water mark. In the decision of the question, it was observed by C. J. Parsons, — "The sea-shore must be understood to be the margin of the sea, in its usual and ordinary state; and when

¹ *Lowe &c. v. Govett*, 3 B. & Adol. R. 967, and 23 Eng. Com. Law, R. 203. Upon the whole, it may be regarded as good law at this day, that the *terra firma*, and right of the subject, in respect of title and ownership, extends beyond the lines of the *high spring* tides, and *spring* tides, and down to the edge of the high-water mark of the *ordinary*, or *neap* tides. Hall on Rights to the Sea, &c.

² *Peyroux v. Howard*, 7 Peters (U. S.) R. 324.

³ *Storer v. Freeman*, 6 Mass. R. 435.

the sea is full, the margin is high-water mark. The sea-shore is therefore all the ground between the *ordinary* high-water mark and low-water mark." Again the same court, in the case of the Commonwealth *v.* Charlestown,¹ understood the rule of the common law to be, that the sovereign and public right extended only to ordinary high-water mark. It was contended in the supreme court of the state of New York, that the rule of the civil law, as above laid down, was the rule to be adopted in that state; and the reason assigned was, that the state was granted by the Dutch government, and that, at the time of the grant, the civil law prevailed in the seven United Provinces. The court, however, adhered to the doctrine of the common law on the subject as laid down by Lord Hale.² Under the colonial ordinance of Massachusetts of 1641, the ebb of the tide, when from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark.³ The rule of the common law is unquestionably subject to any alteration by statute.⁴

¹ Commonwealth *v.* Charlestown, 1 Pick. (Mass.) R. 180.

² Cortelyou *v.* Van Brandt, 2 Johns. (N. Y.) R. 357.

³ Sparhawk *v.* Bullard, 1 Met. (Mass.) R. 95.

⁴ By an act of the state of Virginia, passed February 16, 1819, it is declared that hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay, and the rivers and creeks thereof within the commonwealth, shall extend to ordinary low-water mark; and the owners of said lands shall have, possess and

The rule as to ordinary high-water mark applies as well to the shore of an arm of the sea, or wherever the tide flows and reflows, as to the shore of the sea itself.¹ And an arm of the sea is considered as extending as far into the interior of a country, as the water of fresh rivers is propelled backward by the ingress and pressure of the tide. To the extent that such fresh rivers are backwardly propelled, they are denominated "navigable" rivers;² and to determine whether or not a river is "navigable," both in the common law and in the admiralty acceptance of that term, regard must be had to the ebbing and flowing of the tide.³ In the supreme court of the United States, in a case which came up from the district court of the eastern district of Louisiana, the question was presented of admiralty jurisdiction, in the river Mississippi, which the court considered was to be determined by the ebbing and flowing of the tide; and in determining

enjoy, exclusive rights and privileges to and along the shores thereof, down to *ordinary* low-water mark: *provided*, that nothing in this act contained, shall be construed to affect any creek or river, or such part thereof, as may be comprised within the limits of any survey; and provided also, that nothing in this section contained, shall be construed to prohibit any person from the right of *fishing, fowling and hunting, on those shores of the Atlantic ocean, Chesapeake bay, and the rivers and creeks thereof within the commonwealth, which are now used as common to all the good people thereof.* 3 Ann. Law Reg. 360; and see *State v. Creek Co.* 2 Green (N. J.) R. 301; and see *post*, Chap. VII.

¹ *Case of the Royal Fishery, &c., Davies's R.* 149.

² Hale, *De Jure Maris*.

³ *Sir Henry Constable's Case*, 5 Co. R. 107.

the question, the ordinary state of the water, uninfluenced by any extraordinary freshets, was to be regarded.¹

It was urged in *Rex v. Smith*,² that the river Thames, above London bridge, was not navigable, although it was flowing and reflowing, inasmuch as the tide beyond that limit was occasioned by the pressure and accumulation backward of the fresh water. But the distinction attempted was, by Lord Mansfield, pronounced new and inadmissible. In a case, in the British House of Lords, where the question was, what was to be considered "river" and what "sea;" and where the direction was, that the thing to be looked to is the fact of the absence or prevalence of the fresh water, though strongly impregnated with salt; the direction was held to be erroneous.³ The supreme court of the United States, referring to the above case of *Rex v. Smith*, have decided, that although the current in the river Mississippi, at New Orleans, may be so strong as not to be turned backwards by the tide; yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might

¹ *Peyroux v. Howard*, 7 Peters (U. S.) R. 324. In a case referred to in this case, of the steamboat *Jefferson*, the court said there was no doubt the admiralty jurisdiction existed, although the *commencement*, or *termination* of the voyage might happen to be at some place beyond the reach of the tide. *Ib.* 343, 344.

² *Rex v. Smith*, 2 Doug. R. 441.

³ *Horne v. Mackenzie*, 6 Clark & Finn. R. 628.

properly be said to be within the ebb and flow of the tide.¹ The colonial ordinance of Massachusetts of 1641, is applicable wherever the tide ebbs and flows, though it be fresh water thrown back by the influx of the sea.²

There is therefore an important distinction between the term "navigable" as applied to a river, in its technical sense, and in the common acceptance of it when so applied. In the case of the Royal Fishery of the river Banne, in Ireland, it was resolved, "that there are two kinds of rivers, navigable and not navigable; that every navigable river so high as the sea ebbs and flows in it, is a royal river, and belongs to the king, by virtue of his prerogative; but in *every other* river, and in the fishery of such other river, the *ter-tenants* on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows."³ But all rivers entirely above the influence of the tide, if they are so large as to admit of navigation, and to be of public use for the passage of vessels, boats, &c., may, as well as those which ebb and flow, be under the servitude of the public interest, and be used as "public highways" by water. They are regarded as public,

¹ *Peyroux v. Howard*, 7 Peters (U. S.) R. 324.

² *Lapish v. Bangor Bank*, 8 Greenl. (Me.) R. 85.

³ Case of the Royal Fishery in the River Banne, Davies's R. 149.

not in reference to the *property* in the soil or bed of the river, for that is in the riparian proprietors; but only in reference to public *use*. The doctrine of the common law making this distinction, is so clearly and explicitly laid down by Lord Hale.¹ Hence, the right of property in the soil and bed of "navigable" rivers being thus vested in the sovereign, and that in the soil and bed of rivers, which are only "public highways," being in the riparian proprietors, in adjusting controversies arising between the public and individuals, as to the right of soil covered by water, and the consequent rights of fishery, it may be necessary to ascertain the extent of the flowing of the tide.

But the courts of some of the states in this country, have adjudged, that the common law, so far as it recognizes the above distinction, does not apply to our large fresh water rivers, and that these rivers, without reference to the flow and ebb of the tide, do not belong to the owners of the land adjacent, and that they have not the property in the soil under the water, and the consequent exclusive right of fishing *usque ad filum aquæ*, or to the middle of the river; or, in other words, these rivers are to be deemed not merely "highways" but "navigable." Such have been the decisions in Pennsylvania,² and

¹ *De Jure Maris*.

² *Cavson v. Blazer*, Binn. (Penn.) R. 75; *Shrunk v. Schuylkill*, Nav. Co. 14 S. & Rawle (Penn.) R. 71.

in South Carolina.¹ In Alabama also every stream of water suited to the ordinary purposes of navigation, whether it ebbs and flows or not, (where the government has not expressly granted any part of the bed thereof) is not only a public highway, but the owners of land bounded upon it can assert no private right of soil to the bed of the river.² It has been held by the supreme court of North Carolina, too, that what is a "navigable" river in that state, does not depend upon the rule of the common law; but that waters which are sufficient in fact, to afford a common passage for people in vessels, are to be taken as "navigable."³ In commenting upon the inapplicability of the common law on the subject, one of the judges, in one case, in that state, pronounced it entirely inapplicable, and remarked, that by the rule of the common law, Albemarle and Pimlico sounds, which are inland seas, would not be deemed "navigable" waters, and would be the subject of private property. It makes no difference whether there is, or ever was, any tide in Albemarle sound.⁴

On the other hand, the distinction made by the common law between such rivers as are "navigable," and such as are only "highways," is adhered to in

¹ *Cates v. Waddington*, 1 McCord R. 580.

² *Bullock v. Wilson*, 2 Port. (Ala.) R. 456.

³ *Wilson v. Forbes*, 2 Dev. (N. C.) R. 30.

⁴ *Collins v. Benbury*, 3 Ire. (N. C.) R. 277; and see *Ingraham v. Threadgill*, 3 Dev. (N. C.) 59.

New York.¹ Doubts, it is true, have been expressed by some of the judges in New York, to the contrary; but the effect of those doubts is removed by the decision in the court of errors in that state, in the case of the Commissioners of the Canal Fund *v.* Hemphill,² in which the judgment of the supreme court in favor of the riparian owner, was unanimously affirmed.³ The rule of the common law has been recognized also in the states of Massachusetts and New Hampshire, and has been applied by the courts of both of those states to the river Connecticut.⁴ It has also been recognized by the courts in the states of Connecticut,⁵ Maine,⁶ Maryland,⁷ Virginia,⁸ and Ohio.⁹ It

¹ *Palmer v. Mulligan*, 3 Caines (N. Y.) R. 307; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *People v. Platt*, 17 Ib. 15; *Hooker v. Cummings*, 20 Ib. 90; *Jennings, ex parte*, 6 Cow. (N. Y.) R. 518; *Canal Commissioners v. People*, 5 Wend. (N. Y.) 423; *People v. Canal Appraisers*, 13 Ib. 355.

² *Commissioners of the Canal Fund v. Hemphill*, 26 Wend. (N. Y.) 404.

³ So declared by Walworth, Chan. in *Child v. Hart*, 4 Hill (N. Y. R. 372.

⁴ *Commonwealth v. Chapin*, 5 Pick. (Mass.) R. 190; *Scott v. Wilson*, 3 N. Hamp. R. 321; and see also *Gray v. Bartlett*, 20 Pick. R. 186.

⁵ *Adams v. Pease*, 2 Conn. R. 48; *Chapman v. Kimball*, 9 Ib. 38; *East Haven v. Hemingway*, 7 Ib. 186; *Middletown v. Page*, 8 Ib. 221.

⁶ *Berry v. Carle*, 3 Greenl. (Me.) R. 269; *Spring v. Russell*, 7 Ib. 273; *Same v. Seavey*, 8 Ib. 138.

⁷ *Brown v. Kennedy*, 5 H. & Johns. (Md.) R. 195.

⁸ *Hays v. Bowman*, 1 Rand. (Va.) R. 417; *Mead v. Haynes*, 3 Ib. 33.

⁹ *Gavitt v. Chambers*, 3 Ohio. R. 495; *Lamb v. Ricketts*, 11 Ib. 311.

has been held by the supreme court of Illinois, that the part of the river Mississippi upon which that state is bounded, is not a "navigable" stream at common law, and that, therefore, the riparian ownership extends to the middle of the stream.¹

By the civil law, all rivers in which the flow of water is perennial belong wholly to the public, and the public right extends to the use of the banks as well as to fishing.² *Navigable* rivers, in the language of the civil law, are not merely rivers, in which the tide flows and reflows, but rivers capable of being navigated, that is, navigable in the *common sense* of the term. In the words of the Digest, a navigable river is "*statio iturve navigio*." In the code Napoleon, navigable rivers are spoken of as "*flottables*," that is, rivers admitting floats.³

¹ *Middletown v. Pritchard*, 3 Seam. (Ill.) R. 500. Common law rule also recognized in Indiana, *Cox v. The State*, 3 Black. (Ind.) R. 193. A writer in the *American Jurist*, Vol. 16, on the codification of the laws, thinks the subject of rivers "navigable" commends itself to the cognizance of legislatures, as worthy of a more definite settlement, (p. 70.)

² Dig. 43, 12, 13, 14; Inst. 212; 2 Domat Civ. Law, 382, b. 1, t. 8, s. 1, 2.

³ Dig. 43, 12, 13, 14, 15; Zouch, *El. Jur. Descriptio Juris et Indicii Maritimi*, Part. 1, s. 5; Code Napoleon, b. 2, t. 2, c. 2, art. 556, 560, 561, 562, 563; b. 2, t. 1, c. 3; Ord. Louis 14, s. 3, art. 5.

CHAPTER IV.

OF THE PUBLIC RIGHT OF NAVIGATION.

THE public rights to the use of tidal or "navigable" waters which exist, *ex commune jure*, or of common right, and which as *jura communia*, are contradistinguished from *jura coronæ*, or the sovereign right of property, are the rights of NAVIGATION and of FISHERY.¹ The former we here proceed to consider.

The public right of *navigation* may be called the *primary* right, it being paramount to the public right of fishery. Should an individual, whether in the exercise of the piscarial right which he has in common with the people at large, or of an exclusive right which he has acquired, by grant or prescription, extend a *seine* across the navigable part of an inlet of the sea, or "navigable" river, he might be incommoded by the passing of a vessel. To determine in such an event which right should yield to the other, it is only necessary to consider the *nature* of the two rights, and it will appear obvious at once, that the right of navigation necessarily supposes a free passage, and from its nature excludes every interruption of it. This has been moreover so expressly decided

¹ See *ante*, Chap. I.

in a case in the state of New Jersey : M. *owned* a fishery on the Passaic river, and while his *net* was out in the river, P., who was the owner of a vessel, was navigating it, and in so doing he ran through and injured the net, so as to deprive M. of the use of it. The decision was, that the right of fishing must yield to the right of navigation, where the two rights come in conflict, and that where one right only can be enjoyed, that of navigation must be the one. At the same time, it does not swallow up and obliterate the right of fishery ; and where both rights can at the same time be enjoyed freely and fairly, that of navigation has no authority to trespass upon and incommode the other. The right of navigation, though superior, does not take away the right of fishery, but only limits it ; and limits it only so far as it interferes with its own fair, useful and legitimate exercise. If the master of a vessel, under the pretence of exercising his right, should wantonly turn out of his regular course to run upon a net, or lie in wait till the net be spread, and then crowd sail to reach it ; or, if he should unnecessarily and wantonly anchor on fishing ground ; in these, and in like cases, he is answerable in damages.¹

In an action for disturbing plaintiff's fishery in the river Tweed, it was proved, that the defendant's vessel was moored against a rock on the bank of the

¹ *Post v. Munn*, 1 South. (N. J.) R. 61.

river, where she delivered her cargo; and that the plaintiff was prevented, by the situation of the vessel, from taking as many fish as he would have otherwise done. It further appeared, that vessels frequently lie there; and that there were mooring rings upon the rock, to one of which was fastened the defendant's vessel. The opinion by Wood B. was, "All persons have a right to come there in ships, and to unload, moor, and stay as long as they please. Nevertheless, if they abuse that right, so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right. The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequence, if the owner of a fishery could prescribe how and where they are to moor in a navigable river. The only case I remember like this, is, where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recovered. The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet if he acted wantonly and maliciously, for the purpose of injuring the fishery, the plaintiff is entitled to a verdict; but not otherwise.¹

¹ Anonymous, Durham Assizes, in note to p. 516 of 1 Campb. R.

Where the plaintiff stated in his declaration his possession of a fishery in a public navigable river, and of oysters and oyster brood lying in the bed of the river, and charged, that the defendant, by negligent navigation of his vessel, at times of the tide unseasonable, placed her so that she struck against, and settled upon, the bed of the river, and destroyed large quantities of oysters and oyster brood; it was held, that a tidal navigable river is a highway at all times and states of the tide, and is not suspended during such periods of the tide as leave the channel too shallow to float vessels; and that any grantee of the crown of the soil in such river, must take it subject to such right.¹

Free and convenient navigation of navigable water being a primary object, the legislature of a state may promote it by artificial means, and render the water more useful to the public for navigable purposes, even though the privilege and convenience of fishing of the riparian owners, may be thus impaired.²

A sense of the importance of preserving navigation unobstructed, in all navigable rivers, was manifested in England at a very early period, as is indicated by the laws relating to *sewers*, which are remarkable for their antiquity.³ Especially does it appear by the

¹ *Mayor of Colchester v. Brooke*, 9 Jur. 1090; Q. B. 5 Harr. Dig. *sup.* 781.

² *Hart v. Hill*, 1 Whart. (Penn.) R. 136.

³ *Callis on Sewers*, 25. The first statute in print wherein is the

celebrated instrument of Magna Charta, which declares, that *omnis kidelli deponantur de cetero penitus per Thamesiam et Medwayam et per totam Angliam.*"¹

The principle of this clause has been considered as discountenancing all obstructions to navigation ; and therefore, on an information filed against the defendant for building locks on the Thames, Lord Chief Justice Holt said, that to hinder the course of a navigable river was against Magna Charta.² After Magna Charta, by the statute of Ed. III. c. 4, it was enacted, that "all mills, wears, stanks, stakes and kiddels, which were levied and set in the time of king Edward I., and after, whereby *ships* and *vessels* were disturbed, should be cut and pulled down, without being relieved." This statute was confirmed by the statute of 45 Ed. III., which further provided, that "if any such annoyance be done, it shall be pulled down, and he who shall relevy such annoyance, and be thereof duly attainted, shall incur a penalty of one hundred marks to the king, to be levied by the estreats of the exchequer." The statute of 4 Hen. IV. c. 15, which, after reciting, that "by wears, stakes, and kiddels in the water of the Thames, and in other great rivers through the realm,

frame of a commission of sewers, is the statute of 6 Hen. VI. Ch. 5, but the commissions contained in the Register were long before that time. *Ib.*

¹ See *ante*, Chap. I. p. 23 - 25.

² *Rex v. Clark*, 12 Mod. R. 615.

the *common passage of ships and boats be disturbed*, and also the young fry of fish be destroyed, &c., therefore this statute enacts, that all the former statutes thereof made, be holden, kept, and put in execution."¹ Again, by the statute of 12 Ed. IV. c. 7, all preceding statutes on the subject are confirmed, and penalties prescribed for their violation. These statutes show the sense of the importance which in early times in England was manifested, of the free and unobstructed passage of navigable rivers, and a long continued solicitude and determination to preserve it. By virtue of them, it is held by the courts of England, to this day, that wears appurtenant to fishing places which obstruct the whole or a part of a navigable river, are illegal, unless they can be proved that a license to construct them was granted by the crown before the reign of Ed. I.²

Although in England, the king at this day can make no grant, and do nothing in derogation of the public right of navigation,³ such public right being paramount to any right of the crown,⁴ yet by parliament it may be done, for by an act of that body, the navigation of an arm of the sea may be even

¹ See *Robson v. Robinson*, 3 Doug. R. 307.

² *Williams v. Wilcox*, 8 Adol. & Ell. R. 314, (in Queen's Bench 1838); S. C. 35 Eng. Com. Law R. 396. See *ante*, Chap. I. p. 23-27.

³ Harg. Tracts, 85. Hale's *Treatise De Jure Maris*, &c. And see *ante*, Chap. I. p. 23-27.

⁴ *Williams v. Wilcox*, *sup.* And see opinion of Catron, C. J., in *Corp. of Memphis v. Overton*, 3 Yerg. (Tenn.) R. 389; and the opin-

extinguished.¹ But, it will not be contended, that in the United States, either a state legislature, or the federal government, can completely and permanently obstruct any arm of the sea or navigable river, extensively beneficial to the people of the United States for the purposes of internal trade, and which has always been generally resorted to for such purposes, as being capable of sustaining vessels of a large description with their loading.² The one could not thus totally annihilate navigation, because it would be in collision with the laws of Congress made by virtue of the power given by the constitution to regulate commerce.³ The other manifestly could not do it, because it would conflict with a right which the states have never relinquished, the sovereign right of property in, and dominion over, all tide waters and the soil under them, within their jurisdictional limits.⁴ It would, moreover, if attempted by the legislative power of the general or of a state government, conflict with the free right of passage which the constitution gives to the citizens of one

ion of Bayley, J., in *Blundell v. Catterall*, 5 B. & Ald. R. 91; App. p. xxxi.

¹ *Rex v. Montague*, 4 B. & Cress. R. 598.

² *Cox v. The State*, 3 Black. (Ind.) R. 193. And see *ante*, Ch. II. p. 59-65.

³ *Gibbons v. Ogden*, 9 Wheat. (U. S.) R. 1, and cited more fully *ante*, Chap. II. p. 60.

⁴ *Wilson v. Black Bird Creek Co.* 2 Peters (U. S.) R. 245, and cited more fully in Chap. II. p. 63; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.* 7 N. Hamp. R. 35.

state, within the jurisdiction of another. The river Mississippi is preëminently an open highway, and upon principles of international law, the right of passage in it, by a citizen of any state, is classed among imperfect rights; and such imperfect right is made perfect by the constitution of the United States, which provides, that the citizens of each state shall be entitled to the privileges and immunities of the citizens in the several states.¹

The absolute right of a state to control, regulate, and improve the navigable waters within its jurisdiction, as an attribute of sovereignty, or as a right of superintendence over its own internal police, restrained only by constitutional restrictions in favor of the people of other states, as before explained; or by such restrictions in favor of its own citizens, in respect to their private rights, cannot be in any manner disputed. So far as relates to private sentiment, or even personal convenience, they must undoubtedly be subservient to considerations of public expediency, of which the representatives of the public, the legislature, are the sole proper judges. The principle upon which the public right to navigable streams rests, being manifestly undeniable, and the necessary inference being, that no power but the

¹ Per Catron, C. J., in *Corp. of Memphis v. Overton*, 3 Yerg. (Tenn.) R. 389. And see *Georgetown (City of) v. Alexandria Canal Co.* 12 Peters (U. S.) 91; and *Cornfield v. Coryell*, 4 Wash. (Cir. Co.) R. 379. And see *ante*, p. 59.

legislative power of a state can authorize any use of them, inconsistent with the public right; there could be no difficulty in determining any question relating to them, were it not that the insignificance of some waters, and the little use actually made of them for purposes of transportation, render the application of the principle questionable on the ground of *expediency*. But this difficulty is solved by referring all such cases to the legislature, which will always relinquish the public control over such waters, when the interests of the public at large will be promoted by so doing.¹ "We cannot doubt," says Chief Justice Shaw, in giving the opinion of the supreme court of Massachusetts, "that a navigable stream may cease to be such, by the appropriation of the soil under legislative authority, to other purposes; as if the legislature were to authorize the erection of a solid dam across a navigable creek, and permit the land to be wholly filled up and converted into house lots."² But for courts of judicature, there is only one principle by which they can be governed, and that is, to consider as public property all inlets of the sea,³ leaving the question of comparative public convenience respecting their regulation, management, and disposal to the legislature, and upon such terms, conditions and reservations as the latter power may prescribe.

¹ Commonwealth v. Charlestown, 1 Pick. (Mass.) R. 180.

² Charlestown v. County Commissioners, 3 Met. (Mass.) R. 202.

³ Commonwealth v. Breed, 4 Pick. (Mass.) R. 460. *Ante*, p. 36-47.

Every creek or river into which the tide flows, it has been held in England, is not on that account, necessarily, a public navigable river. If it is navigable only at certain periods of the tide, and then only for a very short time, it is not to be supposed to be a navigable channel, and no individual can complain of its obstruction.¹ In the supreme court of Massachusetts, there was a bill in equity for a perpetual injunction against an obstruction to the navigation of a salt water creek alleged to be to the special injury of the plaintiff, but the water was not navigable for any useful purpose, and only so under some circumstances. The relief prayed was denied, the whole court being of opinion from the evidence, that the creek could not be considered a stream navigable for any useful purpose either of trade or agriculture. The particular gravamen of the complaint was, that the plaintiffs were the owners of a tract of *salt marsh*, and that there had been from time immemorial a salt water navigable creek through this marsh, which was of some benefit to them in the use of their said land; and that the defendants having obtained an act of incorporation, and an authority to build a road and bridge across a river called the "Neponset," and across this tract of *marsh*, were bound in the execution of this authority, to erect a

¹ Per Bayley, J. in *The King v. Montague*, 4 B. & Cress. R. 589, and 10 Eng. Com. Law R. 413.

bridge over this navigable creek, so that the water might freely ebb and flow therein, as it had been heretofore accustomed to flow, and so that the plaintiffs might use it, as a navigable stream for boats, gondolas and light craft. In giving the opinion of the court, Shaw, C. J., observed — “It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or a gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose useful to trade and agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture.”¹ And the obstruction of creeks, authorized by a state legislature passing over deep level marshes adjoining the river Delaware, is not in collision with the power of Congress over commerce and navigation.²

The power of the legislature may without doubt, and has in fact been, in many cases in England and

¹ *Rowe v. Granite Bridge Corporation*, 21 Pick. (Mass.) R. 344.

² *Wilson v. Black Bird Creek Co.* 2 Peters (U. S.) R. 245. See this case more fully cited *ante*, Chap. II. p. 63.

in this country, delegated to individuals either in a natural or corporate capacity, the power of determining when and to what extent public convenience will justify an obstruction to any arm, or inlet of the sea, or navigable river, and of otherwise controlling and regulating them, as the exigencies of the public require. Commissioners of sewers in England have long been invested with this kind of authority.¹ Such officers may be appointed by the legislature of a state in this country to ascertain and secure by permanent boundaries, the proportion of water which ought to flow in the channel of a navigable river.²

¹ *Callis on Sewers*, 25. The laws relating to sewers in England are remarkable for their antiquity. In the Register, in *oyer and terminer*, are two several writs or commissions of this nature; the one authorizing certain persons to survey the defences in a part of the county of Lincoln; the other for viewing and surveying the surrounding grounds between the two rivers Humber and Auckholm, in the same county. The first of these commissions is set down, *verbatim*, in Fitz. N. B. 113. The first statute which appears in print, wherein is a frame for a commission of sewers, is the stat. 6 Hen. VI. ch. 5. But the commissions contained in the Register, and in Fitz. N. B. were unquestionably long before that time, though they received additional aid and power from the statute just named. *Callis on Sewers*. Sir Edward Coke, in the case of the Isle of Ely, says (10 Rep. 141) that "the kings of England, before the making of any statute relative to sewers, might grant commissions for the surveying and repairing of walls, banks, and rivers; and that the first statute was in the time of Hen. III. 9, which is in the first vol. of the English Statutes. See *Rex v. Smith*, as to the power given by an act of Parliament to the magistrates of the city of London to facilitate navigation by towing paths on the river Thames, 2 Doug. R. 441.

² *Propr's. of Mills on Charles River v. Propr's. of Mills on Mill*

Power may also be delegated to the magistrates of a county to determine when it is expedient that a bridge should be thrown over a creek or cove.¹ There will be occasion from time to time to cite other examples of this sort in subsequent parts of our work.

Power also may, and often has been, given to private individuals, and to private corporations established for the accomplishment of projects from which they contemplate *deriving profit*, to appropriate and control tide water and the soil under it, with such reservations and restrictions as the legislature deem fit to prescribe.² A company incorporated and authorized to construct a rail-road by the legislature, have authority to extend their road over basins of tide water, formed by a dam authorized by an act of the legislature to be constructed by another incorporated company; and a prohibition to such rail-road company to build a bridge, was not intended to apply to those basins, but only to the water left open for navigation, — the design of the prohibition being to protect only the navigation.³

The state is invested with the right of enacting

Creek River, 7 Pick. (Mass.) R. 207; *Crenshaw v. State River Co.* 6 Rand. (Va.) R. 245.

¹ *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180.

² See *Rowe v. Granite Bridge Corp.* cited *ante*, p. 89, 90.

³ *Water Power Company v. Boston and Worcester Rail Road Company*, 23 Pick. (Mass.) R. 360. And see *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle (Penn.) R. 71.

such laws as give authority to improve the navigation, and thus promote the interests of the public, even although it may be an inconvenience to a private individual, such inconvenience being *damnum absque injuria*; as if the privilege of fishing of an individual on the banks of a navigable river be impaired thereby. The owner of land fronting on the river Schuylkill, who had exercised the right of drawing seines on his own land, it was held, was not entitled to damages, under the act incorporating the Schuylkill navigation company, for an injury sustained, in consequence of the erection of a dam across the river by that company, by reason of which, shad, herring, as well as other fish, were prevented from passing up the river.¹ The proprietors of the Fryeburg canal in the state of Maine, were held not liable to an action for consequential damages occasioned by turning the channel of Saco river as directed by their act of incorporation. *Damnum absque injuria*, say the court, in this case, is not a legal novelty. It does not, they say, necessarily follow, that because a plaintiff may have sustained a serious injury in his property, consequent upon the voluntary act of a defendant, that he has therefore a right to recover

¹ *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle, R. 71. Compensation, say the court in this case, shall be made for all damage arising from *immediate* injury, and *palpable* and *direct* injury, but not for any damage where there is no legal injury, which is called *damnum absque injuria*. And see *Hart v. Hill*, 1 Whart. (Penn.) R. 124.

damages for that injury. That acts may be justified by an express provision of law ; or that damage may have arisen as the consequence of those acts which others might lawfully do in the enjoyment and exercise of their own rights, and management of their own business ; or that it may have resulted from the application of those principles by which the general good is to be consulted and promoted, though in many respects operating unfavorably to the interests of individuals in society, (continue the court to say in the case referred to) is and must be the law of society.¹ On this principle, where in Pennsylvania, the object of the legislature was to improve navigation, and gave the privilege for that object, to a company, of erecting dams, locks, &c. with the privilege of entering upon the lands of others for those purposes ; it was held, that the legislative grantees have the same right to erect a dam on the river, that a riparian proprietor has to erect one of his own ; and if chargeable with no want of attention to its probable effect, they are not answerable for consequences which it was impossible to foresee and prevent.² In an action for a nuisance created by

¹ *Spring v. Russell*, 7 Green. (Me.) R. 273. If the property of one person happen accidentally to lodge on the land of another, or in waters of which he has the control, the latter in removing it from his premises, is bound to do it with as little injury as possible. *Berry v. Carle*, 3 Green. (Me.) R. 269. And see *post*, Ch. VI.

² *Lehigh Bridge Co. v. Lehigh Coal and Nav. Co.* 4 Rawle (Penn.) R. 9.

obstructing a stream made navigable by law, it was held, that if it appeared to the jury, that the injury to the plaintiff arose from causes which might have been foreseen, such as ordinary periodical freshets or the collection of ice, he, whose superstructure is the immediate cause of the mischief, is liable in damages. But, if the injury be occasioned by an act of Providence, which could not be anticipated, it is *damnum absque injuria*.¹

A corporation was created by the legislature of Connecticut, for the purpose of removing the obstructions to the navigation of Connecticut river, from Hartford to the sound ; it being there a public navigable river, subject to the ebbing and flowing of the tide. To accomplish this object, and not intending to injure any proprietor of land, the corporation erected piers, and put other obstructions in the river, in a prudent and skilful manner, whereby the land of A. adjoining the eastern bank of the river, was gradually undermined and washed away. In an action on the case brought by A. against the corporation, for the injury he thus sustained, it was held,

¹ *Ball v. M'Clintock*, 9 Watts (Penn.) R. 119. In proceeding to estimate the injury sustained by the owner of a mill from a dam raised by the Schuylkill navigation company, it was held, that the jury were to ascertain what was the real damage to the mill in ordinary events, and were not to be governed by the consideration of the profits which the owner might have derived from an accidental rise of the value of grain at the particular time. *Schuylkill Nav. Co. v. Freedley*, 6 Whart. (Penn.) R. 109.

that though the lands of individuals bounding on the river were originally granted by the state, the state did not thereby divest itself of the right and power of improving the navigation of the river; that the state always holding the river for the purpose of navigation, might do every thing for the full enjoyment of such right, not inconsistent with the great constitutional principle, that private property shall not be taken for public use, without just compensation; that it was the duty of the individual proprietors of land adjoining the river, and not of the corporation, to protect the banks from encroachments by the water; and that remote and consequential damages to individuals, resulting from the works of the corporation, authorized by their charter, were not the taking of private property for public use, within the constitutional interdiction, but merely *damnum absque injuria*.¹ This case is not unlike the case of *Rex v. Pegham* in the court of King's Bench in England, where *commissioners of sewers*, acting *bonâ fide* for the benefit of the levels, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, and injure, the adjoining land not within the levels. They could not be compelled, it was held, to make compensation to the owner of the land, or to erect new works for

¹ *Hollister v. Union Company*, 9 Conn. R. 436. The court cite *Henly v. Mayor and Burgesses of Lyme*, 5 Bing. R. 91; S. C. 15 Eng. Com. Law R. 376-384.

his protection ; for that all owners of land exposed to the inroads of the sea, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.¹

The remedy by abatement cannot be applied to the erection of a dam which obstructs navigation, if an appropriate mode of redress is provided by the legislative act which authorizes it. By an act of the legislature of Pennsylvania, the erection of a dam was permitted, and the use of the water granted on the condition that there should be no interference with the navigation and passage of fish. It was by an excess beyond the limit prescribed, the court held, that the act was violated, and the appropriate redress for such mischief, was not utterly to demolish and destroy the dam, but to remove that excess, and adapt the erection to the design of the law. This was provided for by the requisition of the act of the previous inspection of three commissioners ; and by the direction of it, that in case of conviction, the supervisors of highways should remove the grievance, by making the dam conform to the object of the act, and at the cost of the owner.² Nor would an indictment at common law, for the same reason, lie

¹ *Rex v. Pegham*, 5 B. & Cress. R. 350 ; S. C. 15 Eng. Com. Law R. 237.

² *Criswell v. Clugh*, 3 Watts (Penn.) R. 330.

for erecting a dam, by the authority of the above named act, to the obstruction of the navigation.¹

A state legislature may constitutionally incorporate a company to make a lock and slack water navigation, without requiring it to make compensation for consequential damage to private property in the execution of the work. Hence the Monongahela Navigation Company incorporated to make such a navigation from Pittsburg to the line between Pennsylvania and Virginia, by dams and locks in the Monongahela river, was not held liable in an action on the case for obstructing the water on the Youheogany river by a dam in the Monongahela, to the injury of the plaintiff's mill.²

If therefore the more apparent object of an impediment to the navigation be to the profit of an individual grantee, it is the right and duty of the legislature to determine whether the public interest is so connected with the private, as to authorize the act, and the grantee while acting within the powers granted, is not liable for any injury suffered by any other individual by altering the flux and reflux of the tide.³

It was said by the counsel in the case of the Com-

¹ *Brown v. The Commonwealth*, 3 S. & Rawle (Penn.) 273.

² *Law Rep. for May 1844*, p. 38; and see the case in 6 Whart. (Penn.) R. 109.

³ *Parker v. Cutler Mill Dam Corporation*, 2 App. (Me.) R. 353.

monwealth *v. Breed*, in Massachusetts,¹ that the grant of a right to build a bridge was upon the petition and for the especial benefit of an individual. The court said, it was doubtless true; and it was also true, that many other enterprises had originated in motives of private gain, which had resulted in great public improvements.

Very important cases of the description of those above referred to as *damnum absque*, &c. are those of the erection of bridges over navigable water, by authority of the legislature, so near another bridge before erected over the same channel, under the same authority, as injuriously to affect the tolls of the bridge so first erected. The proprietors of a first erected bridge applied to the supreme court of Massachusetts to restrain by an injunction the construction of the second bridge, and the court in 1829, after elaborate and learned arguments by the counsel, on both sides, and upon very great deliberation, dismissed the bill, the judges being equally divided; Parker, C. J., and Putnam, J., being of opinion, that the complaint was maintained, and Morton, J., and Wilde, J., declaring their opinion, that the bill should be dismissed. The case was then brought by writ of error to the supreme court of the United States, in which, in 1837, the decree of the court in Massachusetts was affirmed,—Mr. J. Story dissent-

¹ *Commonwealth v. Breed*, 4 Pick. (Mass.) R. 460.

ing, and accompanying his opinion by a very elaborate and very learned argument, in which Mr. J. Thompson concurred. The opinion of the court against granting the injunction, was delivered by Taney, C. J., and was grounded upon the consideration, that the end of all government is to promote the happiness and prosperity of the community, by which it is established; and that it could never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created; and in a country like this, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the prosperity and happiness of the people. The continued existence of government would be of no great value, if by implications and presumptions, it was to be disarmed of the powers necessary to accomplish the ends of its creation, and if the functions it was designed to perform, were to be transferred to the hands of corporations. While the rights of private property were to be regarded, those of the community should be faithfully preserved.¹

In the case of the Mohawk Bridge Co. v. Utica and Schenectady Railroad Company, in the court of chancery of the state of New York, there was an

¹ Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) R. 344; S. C. in error, 11 Peters (U. S.) R. 420.

application for an injunction by the Mohawk Bridge Company and twenty-four others, to restrain the defendants from erecting a bridge for the passage of their railway over the Mohawk river, at the city of Schenectady. The Mohawk Bridge Company were the owners of a toll bridge across the river about one hundred rods above where the defendants had commenced, and were proceeding to erect their bridge for the passage of their rail-road cars with passengers on their railway; and the other complainants were land owners adjoining the river. The Mohawk Bridge Company alleged in their bill, that the proposed erection would endanger the safety of their bridge by damming up the ice at the breaking up of the river; and also that the carrying of passengers across the river in the rail-road cars would be a damage to the bridge company, by *diverting the travel from their toll bridge*; and would for *that reason* be an injurious interference with the exclusive privilege secured by their charter. And all the complainants insisted, that the rail-road corporation was not authorized by its charter to erect a bridge, or to cross the river with its railway. It was held, that the complainants were not entitled to the relief asked, and the motion for an injunction be denied; that the grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the legislature to grant a similar privilege to others, does not deprive a future legis-

lature of the power to authorize the erection of another toll bridge across the same river so near to the first, as to divert a part of the travel which would have crossed the river on the first bridge, if the last had not been created.¹

The construction, under a charter granted by the legislature of Alabama, of a toll bridge, within a short distance of a licensed ferry, was held in that state not a violation of the vested rights of the ferry keeper. The court considered, that the principle, that private property cannot be subjected to public use without compensation, apply to an alleged loss by the keeper of such ferry.²

“The legislature of Connecticut, in 1808, incorporated a bridge company, with authority to collect tolls, and, in the act of incorporation, prescribed the manner in which the bridge and causeway should be constructed, and required other expenses to be incurred; and then it provided, that whenever the tolls should reimburse to the company the sums advanced by them in building the bridge and the other expenses referred to, with an interest of twelve *per cent. per annum* thereon, the bridge and causeway, and rate of toll, should be subject to such regulations and orders as the legislature should think proper to make. After some other provisions, not material here, it was pro-

¹ Mohawk Bridge Co. v. Utica and Schen. R. Ro. Co. 6 Paige (N. Y.) Ch. R. 554.

² Dyer v. Tuscaloosa Bridge, 2 Port. (Ala.) R. 296.

vided, that the grant might receive such alterations from time to time, by the general assembly, as experience should evince to be necessary or expedient. The charter, with these provisions, was accepted by the company; and the expenses thereby required were incurred, the works completed, and the bridge and causeway approved by the commissioners. The first bridge having been carried away by a flood, in 1818, the general assembly, by an act passed in May of that year, made provision for the erection of a new bridge and causeway, and directed suitable and necessary alterations to be made in the construction thereof, which alterations were such as, when made, to supersede the necessity of the *ferry*; and to carry out fairly the provisions of the original charter, and to provide an indemnity for, and reimbursement of, the increased expenditures imposed by the prescribed alterations, it was provided, that the ferry should be discontinued. To this act was annexed a proviso, that it might, at any time thereafter, be altered, amended or repealed, by the general assembly, in the same manner, as the original act incorporating said bridge company. On a bill in chancery, brought by the *Bridge Company*, against *East Hartford*, for an injunction restraining the defendants from the further use of the ferry, it was held, 1. that the act of 1818 was a contract between the state and the corporation, not only granting privileges, but imposing burdens, and requiring continuing

duties attended with expense; 2. that the corporation having accepted the charter and complied with its requirements, the rights and duties of both parties became fixed and vested, and the legislature had no constitutional power to impair this contract, without the assent of the corporation, unless by virtue of an authority for that purpose, reserved in the charter itself; 3. that the charter ought to be so construed as to carry out the great objects intended by it, which were, first, to make a great and necessary public improvement, at great expense, and secondly, to reimburse those who should venture their money in the undertaking; 4. that the charter constituted a public pledge, that until the expenses of the corporation, with the stipulated interest, should be reimbursed, the general assembly would not make any regulations or orders materially affecting the prescribed revenues of the corporation; 5. that the subsequent reservation of power in the same section of the charter, is not to be construed so as to defeat the declared purpose of the general assembly, to preserve the granted privileges of the corporation inviolate until after it should be fully compensated for its disbursements; but it was to such alterations in the prescribed structure of the bridge and causeway, and perhaps in the mode of supervision and management, as experience should evince to be necessary or expedient, that the legislature, in this clause, had reference; 6. that the acts of 1836 and 1842, pur-

porting to revive the ferry, without reference to the reimbursement of the corporation, and before it had been made, were repugnant to the constitution of the United States, as impairing the obligation of the contract, and were therefore void ; 7. that the defendants having invaded the franchise of the plaintiffs, and continuing such invasion, the relief sought by the bill ought to be granted. [One judge dissenting.]”¹

It was decided by the supreme court of New Hampshire, that a legislative grant of authority to construct and maintain a bridge, *within certain limits*, gave to the grantees a franchise ; and that the legislature could not authorize the construction of another bridge, within the prescribed limits, without provision for compensation to the first grantees.²

A common mode of partially obstructing navigation, is the construction of *bridges*, by the authority of the legislature, over navigable water, a mode, which, without such authority, cannot be justified, even by the riparian owners. It may be, that but little use has been made of the water in question for

¹ The Hartford Bridge Company v. East Hartford, 16 Conn. R. 150.

² Piscataqua Bridge v. New Hampshire Bridge Co. 7 N. Hamp. R. 35. Any person crossing Cayuga lake in New York, on the ice, within *three miles* of Cayuga bridge, is liable to pay toll to the bridge company, as if he crossed the bridge. But if he does not enter on the ice within three miles of the bridge, he is not liable for toll, unless his course is intended as an evasion of the statute. Cayuga Bridge Co. v. Stout, 6 Wend. (N. Y.) 85.

navigable purposes, and that probably no settlement or place of business will be established at its head, or on its banks, and that the public would even be vastly more accommodated by a bridge, than by the unobstructed passage of the water; but nevertheless, the water being navigable and for common use, the legislature alone can authorize the interruption of it. If it could be urged, that the *actual use* of navigable water for navigable purposes is necessary to give it the character of public property; that would go to allow the occupation by individuals of many of the most important public privileges, in the early settlement of the country, before ports and places of deposit had become valuable.¹

It is however well settled, that acts of the legislature of a state, authorizing the construction of bridges over navigable and all waters within its limits, are not unconstitutional.² And it has been held, that there is nothing in the constitution of the United States, authorizing Congress to regulate commerce, or in any act of that body, which militates, in any degree, with the power of granting an exclusive right of building a bridge within the territory of a

¹ Commonwealth v. Charlestown, 1 Pick. (Mass.) R. 180; Inhabitants of Arundel v. McCulloch, 10 Mass. R. 70; Commonwealth v. Coombs, 2 Ib. 492; Cox v. The State, 3 Black. (Ind.) R. 193; Att. Gen. v. N. Jersey Railroad Trans. Co. 2 Green (N. J.) Ch. R. 130.

² Commonwealth v. Breed, 4 Pick. (Mass.) R. 460; Dyer v. Tuscaloosa Bridge, 2 Port. (Ala.) R. 296. See *ante*, pp. 44, 60 – 65, 86, *et seq.*

state.¹ The legislature, however, in the exercise of this authority in the construction of bridges, have ever manifested a solicitous regard for the navigation of the water over which they are to be thrown; and have exercised vigilance in requiring that bridges authorized by them shall be provided with suitable *draws* to allow the passage of vessels. In some cases, the passage of vessels of a description which before had been accustomed to pass has been entirely prevented. But the legislature are to judge whether the public convenience in general will not be more promoted by these partial obstructions and interruptions to navigation, and also upon what terms and

¹ Per Parker, J., in delivering the opinion of the supreme court of New Hampshire, in *Piscataqua Bridge Co. v. N. Hamp. Bridge Co.* 7 N. Hamp. R. 35. That the legislature has exercised authority for the construction and regulation of bridges over arms of the sea and other waters, see *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) R. 344; and *S. C. 11 Peters (U. S.) R. 420*; *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180; *Same v. Coombs*, 2 Mass. R. 489; *Wales v. Stetson*, 1b. 146; *Arundel v. McCulloch*, 10 Mass. R. 70; *Commonwealth v. Breed*, 4 Pick. (Mass.) R. 460; *Hood v. Dighton Bridge*, 3 Mass. R. 263; *Case of Meason's Estate*, 4 Watts (Penn.) R. 341; *State v. Franklin*, 9 Conn. R. 32; *Perry v. Hyde*, 10 Ib. 329; *Brunder v. Chesterfield Justices*, 5 Call (Va.) R. 556; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. Hamp. R. 35; *State v. Compton*, 2 Ib. 513; *Schoolbred v. Corporation, &c. 2 Bay (S. C.) R. 65*; *Thompson v. Androscoggin Bridge*, 5 Greenl. (Me.) R. 62; *Dyer v. Tuscaloosa Bridge*, 2 Port. (Ala.) R. 296; *Wooster v. Van Vetchen*, 10 Johns. (N. Y.) R. 467; *Cayuga v. Stout*, 7 Cow. (N. Y.) R. 33; *Same v. Magee*, 6 Wend. (N. Y.) R. 85; *Schuylkill Bridge v. Fraily*, 13 S. & Rawle (Penn.) R. 422; *Chambersburg, &c. Co. v. Commissioners*, 6 Ib. 229.

conditions they are to be allowed by law.¹ Where the legislature created a corporation, and empowered it to erect, repair, and rebuild a mill-dam on their own land across the head of a harbor, with flood-gates thereto, so as to admit the passage of gondolas and boats at high water; it was held, that the corporation might erect their dam across the head of the harbor, although it might not only be below high-water mark, but across a part of the channel where the tide ebbs and flows; and that the corporation were not liable for any injury suffered by an individual, by altering the flux and reflux of the tide. The words "on their own land," in the act, were not intended, it was held, to fix the place of building, but were intended merely to exclude any inference that the legislature designed to authorize the corporation to take the land of others for that purpose.²

The proprietors of Dighton bridge in Massachusetts, are bound by their charter to raise the draw of the bridge for the passage of loaded lighters, if the masts cannot, with convenience, be taken down, and without delaying their passage.³

Where the legislature authorized an individual to build a bridge over navigable water, with a draw not less than fifteen feet wide, it was held, that he was not bound to make the draw wider than that num-

¹ *Commonwealth v. Breed*, 4 Pick. (Mass.) R. 460.

² *Parker v. Cutler Mill Dam Corp.* 2 App. (Me.) R. 355.

³ *Hood v. Dighton Bridge*, 3 Mass. R. 263.

ber of feet, although vessels of a greater breadth had been accustomed to sail in such waters ; nor to make a wharf or pier to the draw, — a wharf or pier not being an essential part of a draw.¹

Where a charter for a bridge allowed three years for the completion of it, and prescribed, that it should be built with a draw and piers, and the corporation constructed the bridge, and received toll for more than a year, they were held to be indictable for neglect in not building piers, though the three years had not elapsed.²

Where the legislature authorized the building of a bridge “either solid or on piles, leaving sufficient passages for the water,” as certain commissioners might deem necessary, and a bridge was built, by direction of those commissioners, two thirds of the length of which was solid, and the other third over the channel and deeper parts of the stream, was on piles ; and scows, gondolas, boats and vessels without masts, or with movable masts, could and did advantageously pass under the bridge ; it was held, that the stream had not ceased to be navigable, and that the county commissioners had derived no authority to lay out a highway over it.³

¹ *Commonwealth v. Breed*, 4 Pick. (Mass.) R. 460.

² *Commonwealth v. Newburyport Bridge*, 9 Pick. (Mass.) R. 142. But held in this case, that an indictment which merely alleged, that the corporation had neglected to build piers at the draw, was defective, for want of a direct averment that a bridge had been built.

³ *In. of Charlestown v. County Commissioners*, 3 Met. (Mass.) R. 202.

It would seem agreeable to well established principles, that the legislature have at all times, as the guardian of the public interests, the right of regulating draws, and prescribing for what kind of vessels they shall afford a passage. The charter of a bridge company conferred the right of collecting certain tolls for seventy years, and provided that the bridge should have a draw of a certain width for the admission of vessels, and that the company, during the seventy years, should keep the bridge in repair, subject to the inspection of the legislature, and that the grant should not operate to injure the property of individuals. At the end of twenty-four years subsequent to the grant, the legislature by an act, directed the company to open the draw for the passage of any vessel, on a prescribed notice, without expense to the owner, under a penalty. This act, it was held, was not a violation of the rights of the company under their charter.¹

In respect to the construction of a grant to build a bridge in its effect upon the private property of riparian proprietors, it has been expressly adjudged, that a charter authorizing the erection of a toll-bridge from one point to another across a river, confers upon the grantees no right to take the land of a riparian proprietor for the purpose of a toll-house at the side of the bridge; and that it gives nothing more than

¹ New Haven, &c. Toll Bridge Co. v. Bunnell, 4 Conn. R. 54.

an easement in the land on which the bridge is constructed.¹

All obstructions to navigation, whether by bridges, or in any other manner, without direct authority from the legislature, are public nuisances. Lord Hale, in his treatise *de portibus Maris*, notices the several nuisances which may be committed to ports as follows: tilting or choaking up the port by sinking vessels, throwing out filth or trash;² decays of wharves, piers, or keys; leaving anchors without buoys; building new wears or enhancing old; the straitening of the port by building too far into the water; impeding the mooring of ships in the ground adjacent, if it has been anciently used without paying any thing for it; the towing or hauling of vessels up or down a river or creek to or from a port town; and the suffering a port or public passage to be filled or stopped, is a nuisance in those who are bound to repair it.³

The ancient colonial ordinance of Massachusetts of 1641, was made with an especial regard to free and uninterrupted navigation; for, although by it, the property of the shore and of the flats to the extent of one hundred rods, was transferred to the proprietor of the adjoining land, in order that he might build wharves towards the sea that distance,

¹ Thompson v. Androscoggin Bridge, 5 Greenl. (Me.) R. 62.

² See Brackelsbank v. Smith, 2 Burr. R. 656.

³ See also Russell on Crimes, 485.

yet it was intended that he should not thereby so straiten and interrupt the passage over the water as to constitute at common law a public nuisance.¹ The acts of assembly of Pennsylvania have recognized the right of the owner of the land bounding on the space between high and low-water mark to erect wharves down to low-water mark, but before this is done, the flats, when covered by water, may be passed over by boats and rafts.² In an action of trespass for tearing away a bridge, the only claim which the plaintiff had to erect and continue the bridge, was its antiquity and the laying out of a road over the river; but neither of these facts, in the opinion of the court, sanctioned the obstruction of the river, so as to prevent those who had occasion to transport vessels up and down the river, from removing it, if necessary to a safe and convenient passage.³ A public highway cannot be laid out across a navigable stream (without authority from the legislature), because it destroys an existing highway—the river itself—in which all the citizens have an interest.⁴ No evidence can be offered to prove that a wharf is beneficial to the public, and is therefore not to be regarded as a nuisance.⁵ To construct and moor a

¹ *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180; *Keen v. Stetson*, 5 Ib. 492; *Cutler v. Parker Mill Dam Corp.* 533. *Post*, Ch. VII.

² *Ball v. Slack*, 2 Whart. (Penn.) R. 508.

³ *Arundel v. McCulloch*, 10 Mass. R. 70.

⁴ *Keen v. Stetson*, *ib. sup.*

⁵ *Respublica v. Caldwell*, 1 Dallas, R. 150.

floating storehouse or vessel for the receiving and delivering of goods and merchandise in any public river, or any port or harbor, or in the basins, or in the docks thereof, is such a permanent appropriation and exclusive occupation of a public river, and such an obstruction thereof to its free and common use, as to be indictable as a public nuisance.¹ Under an act of the legislature giving an individual and his assigns the right of erecting and maintaining a dam upon navigable waters, and the dam was so constructed as to impede the navigation beyond what the act authorized; it was held, that this rendered it *pro tanto* a nuisance.²

When vessels are sunk by misfortune and inevitable accident, and without any fault on the part of the owner, it is not a nuisance, should the wreck be not removed.³ But a *buoy* must be placed over it for the common safety, and this was held by Lord Ellenborough to be the only proper and specific notice, the one which all understand and are bound to attend to.⁴ The party liable, in such case, though he is not liable to indictment, for not removing the *wreck*, he is liable in damages to an individual occasioned by the neglect of such notice.⁵ An action on

¹ Hart v. City of Albany, 9 Wend. (N. Y.) R. 571.

² Renwick v. Morris, 3 Hill (N. Y.) R. 621.

³ Rex v. Watts, 2 Esp. R. 675.

⁴ Harmond v. Pearson, 1 Campb. R. 515.

⁵ *Ib.*

the case was brought for neglect of the defendant in not placing a buoy over his lighter, which by accident had been sunk in the river Thames, whereby the plaintiff's barge had struck against the lighter and been greatly damaged. No buoy was placed over the wreck until two or three days after, though a watchman was stationed near the spot to warn all vessels to avoid it; and, when on duty, the watchman desired the people on board the barge to keep off, but his admonition was disregarded. The plaintiff, under these circumstances, had a verdict, as a verbal communication, being liable to be misunderstood, was not a sufficient warning.¹

In an action on the case to recover damages for injury done to goods on board of a vessel while she was lying at anchor in the river Delaware, by a vessel coming up the river in the night time, it was held, that if the anchored vessel was moored in the channel without a *visible light* burning at the time, or, if *her watch was not on deck*, and did not do what was customary for the purpose of avoiding a collision, there was such negligence as to bar the action, though there might have been negligence on the other side. It was an undoubted rule, the court considered, that for a loss arising from mutual negligence, neither party can recover.²

¹ Harmond v. Pearson, 1 Campb. R. 515.

² Simpson v. Hand, 6 Whart. (Penn.) R. 311. In Vanderplank v. Miller, in an action for running down a vessel, (1 Mood. & Malk. R.

All obstructions to navigation which are not occasioned by misfortune or inevitable accident, and without any fault on the part of the owner, and which are not authorized by the legislature, are of course public nuisances, and as such, subject the authors of them to *indictment*; ¹ and if licensed by the legislature, or by statute, it is the business of the defendant, in an indictment to bring his case within such statute, as an exception.² It is very well known to be settled law also, that all public nuisances are likewise liable to be *abated*; and the remedy by abatement is in all respects concurrent with that by indictment.³ In *Arundel v. McCulloch*, in Massachusetts,⁴ the question was, whether the doings of the defendant in cutting down and removing a bridge erected over a river without authority from the government, were justifiable on his part; and the court declared it to be clear, that when any public

169; S. C. 29 Eng. Com. Law R. 280), it was held, that the plaintiff could not recover unless the injury was attributable entirely to the fault of the defendant. If the plaintiff were partly in fault, and by care might have avoided the accident, he cannot recover. This was a case of an action by the owner of goods sunk. The case of the *De Koch* in admiralty, was a case where both were in default, the court ordered a mutual contribution. (Vol. 2 of Law Reporter, 311.)

¹ Russell on Crimes, 274; *Rex v. Ward*, 4 Adol. & Ell. R. 384; S. C. 31 Eng. Com. Law R. 384.

² *Commonwealth v. Church*, 1 Burr (Penn.) R. 105.

³ *Coates v. New York*, 7 Cow. (N. Y.) R. 558; *Miles v. Hall*, 9 Wend. (N. Y.) R. 315; *Renwick v. Morris*, 3 Hill (N. Y.) R. 621.

⁴ *Arundel v. McCulloch*, 10 Mass. R. 70.

way is unlawfully obstructed, any individual, who has occasion to use it in a lawful mode, may remove the obstruction; and they considered it settled, that he may even enter upon the land of the party erecting or continuing the obstruction, for the purpose of removing it, doing as little damage as possible to the soil; as nothing more was done, than was necessary to procure a safe passage for the defendant's vessel, the court were satisfied, that no trespass was committed by him. A corporation of a city, whose duty it is to prevent obstructions in a navigable river, will be considered a party aggrieved, and may by its own act, without indictment, abate them as nuisances.¹ As lapse of time will not bar a prosecution for a public nuisance, and as the remedy by abatement is concurrent with the remedy by indictment, although a public nuisance has existed a very long time (more than twenty years), the remedy by abatement is not barred.² The common law remedies for a public nuisance will not be affected by a statute imposing a penalty for the offence, unless negative words be added, evincing an intent to exclude the common law remedies;³ or, in other words, the addition of a penalty by statute for a common law offence, is merely cumulative, and in the

¹ *Hart v. Mayor, &c. of Albany*, in error, 9 Wend. (N. Y.) R. 571.

² *Russ. on Crimes* (Am. Ed. of 1836) 274; *Renwick v. Morris*, *ub. sup.*; *Miles v. Hall*, *ub. sup.*

³ *Dwarris on Stat.* 678, 679.

absence of words expressly to the contrary, such statute detracts nothing from the ordinary remedies at law.¹

But notwithstanding the above ordinary remedies for public nuisances, by indictment and by the act of the party aggrieved, it is now well settled, that a court of *equity* may take jurisdiction of them, *by an information* filed by the attorney general; and the interposition of that court in such cases, though rare, is said to be by no means a modern branch of equitable jurisdiction.² The doctrine has been recog-

¹ *Renwick v. Morris*, *wb. sup.*; *Commonwealth v. Ruggles*, 10 Mass. R. 391.

² *Eden on Injunct.* 262, who refers to an information filed by the attorney general in the reign of Elizabeth. It is now settled, that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney general; but the jurisdiction seems to have been acted on with great caution and hesitancy. Thus it is said by Lord Eldon, that instances of the interposition of a court of equity, in England, upon the subject of public nuisances, are confined and rare, and more is to be collected from what has been done in the court of exchequer upon discussion of the right of the attorney general, by some species of information, to seek on the equitable side of that court relief as to nuisance, and if the term may be used, preventive relief. *Attorney General v. Cleaver*, 18 Ves. R. 211. Chancellor Kent, in 2 Johns. Ch. R. 382, remarks, that the equity jurisdiction, in cases of public nuisance, in the only cases in which it had been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half; that is, from Charles I. down to the year 1795. But the jurisdiction has been finally sustained, upon the principle, that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all, that it is confessedly one of delicacy, and accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent dan

nized by the supreme court of Massachusetts, that where it is obviously necessary that a nuisance should be immediately suppressed, as in the case of a powder house, or a slaughter house, or a chemical laboratory, equity will interfere until the slower process by indictment can be put in motion.¹ But the very fact, that there have been doubts on the subject of equitable jurisdiction in cases of public nuisances, should be sufficient to induce caution on the part of a court of equity. In cases of public nuisance, there is an undisputed jurisdiction in the common law courts by indictment; and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals. A bill or information was filed in the court of chancery of New Jersey, by the attorney general, in the name of the state, charging the defendants with being in the act of erecting a bridge over the Passaic river, which is a navigable stream, in such a way as to interfere materially with the navigation; and it called upon the court, on the ground that the bridge would be a serious detriment to the community and a public nuisance, to interfere and prevent the further erection of the same; and also to order the same to be abated. By the erection of the bridge, the information charged, great mischief and irrepara-

ger of irreparable mischief before the tardiness of the law could reach it. *Georgetown v. Alexandria Canal Co.* 12 Peters (U. S.) R. 91.

¹ *Rowe v. Granite Bridge Corp.* 21 Pick. (Mass.) R. 344.

ble injury would ensue to the public. But the application for an injunction was denied, on the ground, that a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals; and in this case, the proper course was by indictment at common law.¹ In all cases of public nuisances requiring immediate suppression, the equity side of the the supreme court of the United States have jurisdiction.²

If an individual receives *special damage* from a public nuisance, it renders it, as regards him, a private nuisance, he having suffered to that extent beyond the rest of the community; and it has therefore been long well established, that he may maintain an action on the case as if it were a private nuisance, for such particular damage.³ In an action on the case for a nuisance, the declaration alleged, in substance, that the defendants wrongfully placed beams and spars in a certain navigable river, whereby the access from the river to the plaintiff's public house was obstructed, and "divers persons, who would otherwise have come to the plaintiff's house and taken refreshments there, were hindered and prevented from so doing." It was held, that the declaration did not state a public nuisance, and that

¹ Attorney General v. New Jersey Rail. and Trans. Co. 2 Green (N. J.) Ch. R. 136. See *post*, Ch. VII.

² Georgetown v. Alexandria Canal Co. 12 Peters (U. S.) R. 91.

³ *Ib.* Cary v. Brooks, 1 Hill (S. C.) R. 365.

even if it had done so, the plaintiff would have a right of action for the particular injury to himself; and that the general allegation of particular damage to himself was sufficient, and without alleging the loss of any particular customers.¹ The erection of a dam in navigable tide water under an act of the Pennsylvania legislature (of 23 March, 1803) which causes the formation of an obstruction in the water below, subjects him who erected or maintains it to any damage, in an action on the case, which such obstruction may occasion to any navigator.² The court in a case in Maryland, left it for the jury to decide whether, by the construction of an embankment in the river Patapsco, the plaintiff had sustained special damage.³ An action on the case will lie by the owner of salt meadow on a navigable stream, for obstructing by a dam, the natural ebb of the tide, and thereby injuring the grass on such meadow.⁴ Where the legislature of Massachusetts authorized a corporation to build a mill-dam across a navigable river of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should be thereby injuriously flowed, it was held, that the remedy must be by an action at common law, and not by a

¹ *Rose v. Groves*, 3 Dowl. Pr. Cases (N. Series) 61.

² *Bacon v. Arthur*, 4 Watts (Penn.) R. 437.

³ *Harrison v. Sterrett*, 4 H. & McHen. (Md.) R. 540.

⁴ *Turner v. Blodget*, 5 Met. (Mass.) R. 240, (note.)

process under the statute of 1795, c. 74, respecting mills.¹

As it is well established, that a court of equity may interpose by the preventive remedy by injunction in cases of alleged apprehended and irreparable mischief from *private* nuisances, and as public nuisances become private as regards an individual reasonably apprehending therefrom a particular injury to himself, he may file a bill in equity in respect of a public nuisance under such circumstances.² But the principle undoubtedly is, that in case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot stand in a court of equity, unless he avers and proves some special injury.³ A bill was filed for an injunction to restrain the defendant from obstructing a street in the city of New York, which averred, that he was building a house upon that street to the great injury of the plaintiffs, as owners of lots on and adjoining the street; the injunction

¹ Cogswell v. Essex Mill Corp. 6 Pick. (Mass.) R. 94.

² See opinion of the court, by Shaw, C. J., in Rowe v. Granite Bridge Corp. 21 Pick. (Mass.) R. 344. Though the grant of a right to erect wharves, and employ steam-boats, if destructive of the paramount rights of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to *special injuries in violation of private rights*. Delaware and Maryland Rail Ro. Co. v. Stump, 8 G. & Johna. (Md.) R. 479.

³ Crowder v. Tinkler, 19 Ves. R. 616; Georgetown v. Alexandria Canal Co. *ub. sup.*; Mohawk Bridge Co. v. Utica and Schen. R. Ro. Co. 6 Paige (N. Y.) Ch. R. 554.

was granted, — Kent, chancellor, saying, that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it; that the obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs.¹ It was held by the same court in 1834, that where lands are dedicated to the use of the inhabitants of a city or incorporated village for a public square, a bill may be filed not only in the name of the corporation to restrain the erection of a nuisance thereon; but the grantee of a lot adjoining such square, may file a bill to restrain the grantor from violating a covenant that it shall be kept open for the benefit of his lot, and he may join with the corporation in the suit.² In such cases it is not necessary that the attorney general should be a party, although the nuisance is one which subjects the author of it to indictment.³ In *Sampson v. Smith*,⁴ the vice chancellor said — “Here the plaintiff represents that something has been done which is highly injurious to himself, and also to certain other individuals; which averment it was not necessary for him to make. In a case so constituted I do not see, if the

¹ *Corning v. Lowerre*, 2 Johns. (N. Y.) Ch. R. 439.

² *Trustees of Watertown v. Cowen*, 4 Paige (N. Y.) Ch. R. 510.

³ *Spencer v. Birmingham and London Railway Co.* 1 Cases relating to Railways and Canals, 159; *Georgetown v. Alexandria Canal Co.* 12 Peters (U. S.) R. 91.

⁴ *Sampson v. Smith*, 8 Simons, Ch. R. 272.

attorney general were a party, that I could make a decree which would bind the question between the defendant and the public; and, unless having the attorney a party, would enable me to make a decree which would bind the public, through the attorney general, it appears to me, that it is not necessary to make him a party." A decree for a perpetual injunction to restrain the erection of a nuisance which would endanger the health of the town of Tarborough, in North Carolina, was made upon a bill filed by the attorney general and the inhabitants of the town jointly.¹

¹ Attorney General et al. v. Blount, 4 Hawk's (N. C.) R. 384.

NOTE. — Since this chapter was written, the author has met with the following notice in the New Bedford Mercury of April 20, 1847: "A bridge over navigable waters, under the authority of the state, not indictable as a nuisance, in the circuit court of the United States." Then follows an abstract of the opinion delivered by Judge Woodbury, in Boston, on 15th of the same month, quashing the indictment in the case of the proprietors of the New Bedford bridge over the Accushnet river, for maintaining a bridge over navigable waters. The learned judge held, as has been before held (see *ante*, p. 60–65), that where the states do not grant to Congress powers over their internal commerce or police, those powers can continue to be exercised to any extent by them till they conflict with the proper exercise by Congress of other powers, which are granted to it. The old states had, before the constitution, a sovereign power over tide waters, and could obstruct them by bridges, when they deemed them demanded by the public interests; and they still retained the powers before possessed, except where granted to Congress. (See *ante*, p. 86–89.)

CHAPTER V.

OF THE PUBLIC RIGHT OF FISHERY.

FISHERY in the sea, and in the waters which are made to flow inland therefrom by its egress and influence, constituting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance, that it has ever been regarded a privilege open and common to all persons. Selden in his *Mare Clausum*, and Grotius, *De Jure Gentium*, have collected from the works of the learned of all civilized nations, as well philosophers, divines, and poets, as lawyers, to prove that the waters of the sea are, conformably to the use which nature intended them, as common to all men as the air which blows over them. The obvious justice, that fishery in such waters should be free, open, and common to every one, has made it a part of the civil law and of the common law. *Jus piscandi*, says the former, *omnibus commune est in portu fluminibusque*.¹ The civil law on the subject, is the customary law of France, and is recognized and expressly confirmed, by the ordinance of Louis XIV., which thus declares, (sec. 47) — “We declare the fishing in the sea to be com-

¹ Inst. L. 2, t. 1. See *ante*, Chap. I. p. 18.

mon to all our subjects, whom we allow to fish, as well in the high sea, as upon the shore, with the nets and engines specified in this ordinance." The civil code of Louisiana declares, that navigable rivers, sea ports, roads, harbors, &c. are among things public, or among things the use of which is allowed to all the members of the nation; and that hence it follows, that every man has a right freely to fish in the rivers, ports, roads and harbors.¹

By the common law, (though the right of fishery is subservient in a measure to the right of navigation),² it has ever been well settled, that no member of the community can be excluded from an equal and fair participation of the benefit afforded by tide waters of fishing therein, so long as it remains unrelinquished or not curtailed by public authority, or so long as no particular and exclusive right has been acquired by an individual by prescription, or by the inhabitants of a place, by custom. In England, although the king, says Lord Hale,³ "has the primary right of fishing in the sea, and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea, or the creeks and arms thereof, as a *public common of piscary*, and may not without injury to their right, be

¹ Civil Code of Louisiana, Fisheries, Art. 6.

² See *ante*, preceding Chap. p. 80 - 83.

³ *De Jure Maris*, Harg. Tracts, 11. See also *Warren v. Mathews*, 6 Mod. R. 73.

restrained in the exercise of it, unless in such places, creeks or navigable rivers where either the king, or some particular subject has acquired a property exclusive of this common liberty."¹ The doctrine as thus laid down is expressly recognized in *Carter v.*

¹ " *This common Liberty.*"— Whether there is a distinction between common of fishery, and free fishery, has formerly given rise to much discussion, and discrepancy of opinion. See the discussion at the bar, in *Freary v. Cook*, 14 Mass. R. 488. The better opinion now is, that there is no distinction. Woolrych says, that sometimes a free fishery is confounded with a *several*, and sometimes said to be synonymous with common; and again it is mentioned, as a royal franchise. Yet, notwithstanding the diversity of opinions, this author, upon careful investigation of the authorities, thinks, that to consider free fishery as the same with common of fishery, is a reasonable as well as legal conclusion. *Woolrych on the Law of Waters*, &c. 97. Hargrave considers, that free fishery implies no exclusive right, and is synonymous with common of fishery. *Note to Co. Litt.* 122, a. Schultes arrives at the conclusion, after having closely studied the various authorities, that *libera piscaria* and *commune piscaria* are the same; and they are mentioned, he asserts, in the old authors indiscriminately, without signifying any essential difference. He refers also to the case of *Carter v. Murcott*, (4 Burr. R. 2162), in which all the judges were of his opinion; and to the case of *Seymour v. Courtenay*, (5 Burr. R. 2816), in which Mr. C. J. Eyre entertained a like opinion. *Schultes on Aquatic Rights*, 67. In *Melvin v. Whiting*, in Massachusetts, the court adopted the opinion, that a free fishery is only a common of fishery, such being the most agreeable to authority, and most conformable to the popular sense of the term "free fishery, in this country." 7 Pick. R. 79. A *several* is an exclusive right of fishery, as is that which is vested in riparian owners opposite their lands, upon all rivers above tide water, in virtue of their ownership of the soil, to the middle of the river. And Kent considers, that the more easy and intelligible arrangement on the subject of piscarial rights, is "to divide the right of fishing into a right common to all, and a right vested in one or a few individuals." 3 Kent, Comm. 411.

Murcot,¹ in which it was asserted by Lord Mansfield, that a man may have an exclusive privilege of fishing in an arm of the sea ; but such right *is not to be presumed*, it must be *proved*. In the same case, Yates, J. observed, that he knew a case to fail wherein an exclusive right was claimed, because no prescription was proved, and in that case, it was determined, that the right of fishing in the salt water was common to all. The case of the Mayor and Commonalty of Orford *v.* Richardson in the king's bench, and afterwards in the exchequer chamber, was determined wholly on the ground, that every subject, *prima facie*, has a right to fish in an arm of the sea.²

The common law on the subject of the sovereign and public right of property generally in tide waters, in this country, has been already shown to be unaffected by the colonial charters to what were afterwards the original states of the union, and that new states stand upon the same footing in this respect as the original states.³ The following saving or exception in the charter granted to Lord Baltimore, "saving always to us, our heirs and successors, and to all our subjects of our realm of *England* and *Ireland*, the liberty of fishing for sea fish," &c. gave rise to a question in Maryland, whether the inhabitants of

¹ Carter *v.* Murcot, 4 Burr. R. 2162.

² Mayor, &c. of Orford *v.* Richardson, 4 T. R. 437.

³ See *ante*, Ch. II.

that province, or of any other part of America, were entitled to the right of fishing. The question received the opinion of the most able counsel of the day, who thus considered it.—“The term ‘*regnum*’ in the original charter, or ‘*realm*,’ does not extend to America, in the proper and legal signification of the word, nor could it be intended to extend to America. Maryland is no part of the realm or kingdom of England, but is a part of its royalty, or of the dominions belonging to it; realm or kingdom is that which gives to the head or governor the title or denomination of ‘king.’

“The people of Maryland are the subjects of the king of England, not his subjects of or in the realm, or kingdom of England, but in the dominions belonging to it. This is the proper and strict sense of the words, and corresponds with the nature and regular operation of a saving or exception.

“When the charter of the province was framed, it was thought that extensive fisheries might be carried on here, as a matter of great consequence in the national trade and navigation. As extensive legislative authority was conferred by the charter, under which, regulations might have been made, (if not controlled by the saving) less favorable to the *English* and *Irish*, than the inhabitants here; but it is not to be supposed that acts of assembly would be wanting, to put the people here upon as good a footing, as any other, and therefore there seems to be very

little reason for the notion, that the distinction is unfavorable to the people of Maryland, when it only imports that the liberty is secured to one, against the attempts of the other, and yet leaves to the latter the right of exercising it, in what manner they please, not affecting the liberty of the former, if the provincial legislature should think it for the public benefit. And since an act of assembly may confer the same liberty and privilege to the inhabitants of Maryland, that is contained in the saving, may regulate, restrain or control it, as the general interest may require, I apprehend that the saving is rather favorable to the inhabitants here than otherwise, according to the above interpretation.”¹ The construction of the colonial charter of Maryland which has been maintained by the courts of Maryland since it became a state at the revolution, is, that the right of fishing in the tide waters of the state is, and ever has been, a public and common right in the people, subject to be controlled by the legislature.²

An action of ejectment was brought for one hundred acres of land covered with water, in Raritan bay, in the town of Perth Amboy, in the state of

¹ Opinion of Daniel Dulany, Esq., at one time the attorney general of Maryland, when the question was proposed to him in 1768. It is to be found in the App. to the first vol. of the Reports of Harris & McHenry, p. 564.

² *Brown v. Kennedy*, 5 H. & Johns. (Md.) R. 193. And see more fully on this subject, *ante*, Chap. II. p. 40, 41.

New Jersey. The land claimed was beneath the waters of the Raritan river and bay, where the tide ebbs and flows; and the principal right in dispute was the property in the *oyster* fisheries in the public rivers and bays of East New Jersey. The claim was made under the charters of Charles II. to his brother the duke of York, in 1664 and 1679, for the purpose of enabling him to plant a colony. The land in controversy was within the boundaries of the charters, and is now within the limits of the state of New Jersey. The territory, by succeeding conveyances, became vested in the proprietors of East Jersey, who conveyed the premises in controversy to the defendant in error. By the terms of the grant to the proprietors, they were originally invested with all the rights of government and property which were conferred on the duke of York. The defendant in error claimed the exclusive right to take *oysters* in the place granted to him, by virtue of his title under the proprietors. The plaintiffs in error, as grantees of the state of New Jersey, under a law of the state passed in 1824, claimed the exclusive right to take oysters in the same place. The supreme court of the United States held, that it would require plain language in the letters patent to the duke of York, to persuade them that the public and common right of fishing in navigable waters, which had been ever since Magna Charta, so carefully guarded in England, and which was preserved in every other

colony founded on the Atlantic borders, was intended in this one instance to be taken away. There was nothing, the court decided, in the charter that required this conclusion. The power which, before the revolution, was in parliament to abridge the public and common right of fishery, or to grant an exclusive piscarial privilege, was, upon the happening of that great event, vested in the state.¹

None of the colonial charters differed materially from the charters of Maryland and of New Jersey, in the terms in which the bays, rivers, and arms of the sea, and the soil under them, were conveyed to the grantees, yet in no one of the colonies has the soil under its navigable waters, and the rights of fishery, been severed by the letters patent from the powers of government. From the time of their settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy, in common, the benefits and advantages of the navigable waters, for the purpose of fishing, to the same extent, that they have been used and enjoyed for centuries in England. The inconsistency of its being otherwise, is at once evident on considering that the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably

¹ *Martin v. Waddell*, 16 Peters (U. S.) R. 369, and cited more fully *ante*, Ch. II. p. 42, 43. And see App p. xli.

attended their emigration, and to people the banks of the bays and rivers, if the land under the water were so held as private property, that the settler upon the upland was thereby excluded from the enjoyment of the privilege of fishing.¹

The English doctrine as to the common right of piscary in tide waters, was declared to be the law by the supreme court of New Jersey,² as it has been so declared or so recognized by the courts of other states.³ The *prima facie* common right is, in fact, directly or indirectly recognized in every case in this country, relating to the right of property in tide waters. The legislature of the state of New York, when they re-enacted, in 1787, all the British statutes that were deemed applicable, considered a common of piscary in tide waters an existing right, inasmuch as they provided the writ of *novel disseisin* for the disturbance of it.⁴ The labor and expense of digging out a fishing place, gives no exclusive right of fishery;⁵ and by the principles of the com-

¹ See opinion of supreme court of U. States, by Taney, C. J., in *Martin v. Waddell*, App. p. xci.

² *Arnold v. Mundy*, 1 Halst. (N. J.) R. 1.

³ *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180; *Berry v. Carle*, 3 Green. (Me.) R. 269; *Scott v. Wilson*, 3 N. Hamp. R. 321; *King v. Lay*, 5 Day (Conn.) R. 72; *Adams v. Pease*, 2 Conn. R. 481; 2 Dane's Abr. 692; 3 Kent, Comm. 414.

⁴ 3 Kent, Comm. 415. And see *People v. Platt*, 17 Johns. (N. Y.) R. 195; *Hooker v. Cummings*, 20 Ib. 90; *Jennings, ex parte*, 6 Cowen (N. Y.) R. 518; *Rogers v. Jones*, 1 Wend. (N. Y.) R. 237.

⁵ *Westfall v. Van Anker*, 12 Johns. (N. Y.) R. 424.

mon law, as they are understood and applied by our courts, a town has no exclusive right of property in a fishery in the tide waters within its jurisdictional limits.¹ Neither has it authority, by virtue of its incorporation, to pass rules and regulations restrictive of the public right; such authority can only be derived by an express act to that effect of the legislature.² Towns adjoining, or extending over, a navigable river, may own the soil of the flats, and even of the channel, if a grant has been obtained from the government; but the right to fish still remains a common right in the public;³ and subject only to such restraints as the government may impose.⁴

If there are no words in a patent from the government showing an intention to grant an exclusive fishery, it still remains public. A title to the *locus in quo* was made under a patent to H. P., by which eight islands and two flats of land, lying and being in the Hudson river, were granted to the patentee. The court considered, that as there were no words in the patent showing an intention in the government to grant a fishery, it would be a reasonable interpretation of it to regard it as an ordinary grant

¹ *Randolph v. Braintree*, 4 Mass. R. 315.

² *Palmer v. Hicks*, 6 Johns. (N. Y.) R. 133. And see as to authority of towns over tide waters, within their limits, *ante*, Chap. II. p. 46.

³ *Coolidge v. Williams*, 4 Mass. R. 140.

⁴ *Commonwealth v. Chapin*, 5 Pick. (Mass.) R. 199.

of land for agricultural or other purposes, to which land is usually applied; subject, however, to be used both as a common highway and public fishery, until otherwise appropriated by the private owner. A grant from the patentee of an exclusive privilege of fishing for ten years on the flats in question, which were sometimes covered with water, was held therefore not to be a lease of the fishery, but of the right of drawing nets upon the flats, such being the purpose for which they had been used, and this being in the power of the lessor to grant; but the fishery on the flats still continued common.¹ In Pennsylvania, in which state riparian proprietors have by custom the right of soil in the Susquehanna, Delaware, and other principal rivers to low-water mark,² they have not an exclusive liberty to fish in front of their land, the right to fish in these rivers being vested in the state and open to all.³ Where a legislative act contained a general prohibition of fishing in certain places in a navigable river, and afterwards upon the unfounded representation of an individual, that his own exclusive fishery is included in the act, the legislature by a resolve were induced to suspend the prohibition in respect to his alleged private right, it was held, that such resolve did not amount to a legislative grant of an exclusive right

¹ *Brink v. Richmyer*, 14 Johns. (N. Y.) R. 255.

² *Ball v. Slack*, 2 Whart. (Penn.) R. 539.

³ *Carson v. Blazer*, 2 Binn. (Penn.) R. 475; *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle (Penn.) R. 71.

of fishery; and hence when the act was repealed, the individual had only a common right to fish with others. The legislature unquestionably supposed, that according to the common opinion prevalent at the time of the passage of the resolve, that the memorialist had the sole right to fish in front of his land.¹ The *primâ facie* right of the public is not rebutted by proof of mere uninterrupted enjoyment of the privilege of fishing for more than twenty years; the mere lawful exercise of a common right for that period never being considered as conferring an exclusive right.²

The *primâ facie* public and common right of piscary, is not confined to floating or swimming fish of every description, but extends to *shell-fish*.³ And it is not controverted by any authority, that the right of taking shell-fish on the *shore*, between high and low-water mark, is, in legal presumption, a common right. On the contrary, in England and in this country such a common right is recognized and established. In *Bagott v. Orr*⁴ the court recognize a common right in every subject to take shell-fish on

¹ *Chalker v. Dickinson*, 1 Conn. R. 382; *Ib.* 510.

² *Delaware and Maryland R. Ro. Co. v. Stump*, 8 G. & Johns. (Md.) R. 479; *Chalker v. Dickinson*, 1 Conn. R. 382; *Ib.* 510.

³ *Martin v. Waddell*, 16 Peters (U. S.) R. 357, and App. xli; *Arnold v. Mundy*, 1 Halst. (N. J.) R. 1; *Fleet v. Hegeman*, 14 Wend. (N. Y.) R. 42; *Cornfield v. Coryell*, 4 Wash. (Cir. Co.) R. 376

⁴ *Bagott v. Orr*, 2 Bos. & Pull. R. 472.

the shore by digging up the soil. The supreme court of Maine have expressly declared, that the right of piscary is common to all the citizens, and that the right extends to the taking of shell-fish *on the shore*.¹ In a case in the supreme court of Connecticut, the declaration stated, that the defendant entered upon the plaintiff's land, dug up the soil, and destroyed the sedge, herbage, &c. growing thereon, and took therefrom great quantities of *oysters*, *clams*, and other *shell-fish*. The land described in the declaration, consisted of a tract of upland and about seven acres of sedge flats contiguous, which were overflowed at high water, but which were above low-water mark, and so as to be entirely overgrown with sedge. It appeared, on trial, that the defendant, at the time mentioned in the declaration, entered upon such flats, and dug up the soil, and carried away a quantity of *clams*. Notwithstanding the plaintiff established his title to all the soil in question to the satisfaction of the court, yet the court held, that by virtue of the general principle of the presumed common right of fishery, the defendant had the privilege to take shell-fish upon the flats at low water, and in the exercise of it, to dig up the soil.² Both this

¹ *Parker v. Cutler Mill Dam Corp.* 2 App. (Me.) R. 353.

² *Peck v. Lockwood*, 5 Day (Conn.) R. 22. By the customary law of Connecticut a riparian has the right of soil between high and low-water mark so as to entitle him to construct wharves (*E. Haven v. Hemingway*, 7 Conn. R. 186); but before the soil had been so reclaimed, the right of fishing on the flats, it appears, remains common.

case and that of *Bagott v. Orr* above referred to, show, that the right of shell-fishery on the shore may be separated from the ownership of the soil therein. It is true, that the ownership of the soil may afford some color or pretext to the claim of the individual to a private or *several* fishery, yet unless such owner, and the former owners of such soil, have immemorially excluded the public, by means of a several fishery, prescribed and proved, or founded in express ancient grant, the public right, by the common law of England, will prevail.¹

As the right of fishing in the sea, and in all inland tide and navigable waters, is *prima facie* common to all, it follows that an actual appropriation or man-cupation must be made of the fish to complete the right of property ; and that when the fish are taken, they become the exclusive property of the taker, unless voluntarily restored to their native element. Bracton and Fleta both lay it down as the common

¹ As appears *ante*, p. 33, and 133. And see *Somerset v. Fogwell*, 5 B. & Cress. R. 875 ; *Hall on Rights to the Sea*, &c. 54. That the modern opinion in England is, that the soil may be in an individual, without giving him an exclusive right of fishery, was the opinion of Chief Justice Tindal, in 1826, when at the bar. "I am of opinion," says he, "that the owners of the fishery of O. will not be able, under the circumstances stated in this case, to establish their claim to the soil between high and low-water mark. The word 'fishery' does not of itself convey the right to the soil. The soil may be in the crown, or in the lord of the adjoining manor, whilst the fishery is in another person." No action was brought. 28 Lond. Law Mag. 336.

law that fishes are "*animalia quæ in mari nascuntur quæ cum capiuntur captoris fiunt.*"¹ But the possession of the fish must be complete. Two persons were the owners of boats employed in fishing, and the boat of one of them cast a fishing seine round a shoal of mackerel, with the exception of a comparatively small opening, which the seine did not quite fill up, but through which, in the opinion of witnesses, the fish could not escape. The boat of the other person then came through the opening and took the mackerel. It was held, that the first person could not maintain trespass for taking his fish, his possession not having been complete.² By the custom of the Greenland whale fishery, the first taker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line, that he might probably have secured the whale without the interference of the second striker; and if, while the fish is fast to the harpoon of the first striker, another comes up unsolicited, and so disturbs the fish that she breaks from the first harpoon, and then he strikes her with a harpoon himself and secures her, the fish continues the property of the first striker.³

¹ Bract. L. 1, c. 12, s. 10; Fleta L. 3, c. 2.

² *Young v. Hichens*, 1 Dav. & M. R. 592.

³ So decided, in England, in an action of trover for a whale, in *Hogarth v. Jackson*, 1 Mod. & Malk. R. 56, and 29 Eng. Com. Law R. 247; S. C. 2 Carr. & Payne, R. 595, and 12 Eng. Com. Law R. 271.

But the rule as to the abandonment of fish taken by being restored to their original element, though well settled as it appears in its application to floating fish, does not in all cases apply to *shell-fish*. Oysters, for instance, may be taken and thus become the property of him who takes them, and if he plants them in a new place flowed by tide water, visibly denoted, and where there are none naturally, and for his own particular benefit, it is not regarded as an abandonment of his property in them. The important question, whether oysters *planted* by an indi-

The following note is appended to this case : — *Skinner and Others v. Chapman and Others*, (*Ex relatione* Alderson, one of the judges) tried at York at the Lent assizes, 1827, which also was an action of trover for a whale, the same law was stated with respect to friendly harpoons, but the case turned upon another question. It appeared that while the fish was unquestionably fast, the boat of the defendants came up, and the crew struck the fish with a lance ; and afterwards, with a harpoon, and finally secured it. The blow of the lance was of no service towards securing the fish, but it made it struggle violently, and in the struggle the harpoon of the plaintiffs was disengaged ; but it did not clearly appear, whether this took place before or after the *harpoon* was struck by the crew of the defendants. Bayley, J., left it to the jury to say whether the harpoon of the plaintiffs was fast when the harpoon of the defendants was struck ; and, if they thought it was not, whether the plaintiffs could have secured the fish if the *lance* of the defendants had not been struck ; saying, that he was clearly of opinion that when one party has struck an animal, if another comes unsolicited, does an act which prevents the first striker from killing it, and then kills it himself, he kills it, not for his own benefit, but for that of the first striker. The jury found that the fish was loose when the harpoon of the defendants was struck ; but that she had become so in consequence of the blow given by their crew with the lance ; on which the verdict was entered for the plaintiffs.

vidual, clearly designated and marked out in a bay, or arm of the sea, thus became the property of him who planted them, arose in New York, and it was decided affirmatively. In this case, the oyster fishery belonged by virtue of an early grant exclusively to the inhabitants of the town of Oyster Bay, and it was determined, that one individual who was an inhabitant, had, in the manner above mentioned, acquired a sole right against the others. The plaintiff had gathered the oysters when small, some two years before the trial, and planted them in a bed in the bay, about fifteen rods from the shore. *None grew there at the time, nor had any grown there outside the bed since.* It was admitted, that a qualified property in the oysters was acquired by the plaintiffs; but it was contended, that the planting them in the bay, where a common right of taking them existed, was an abandonment of them. The court were of opinion, that the case fully disclosed, that no such intent of abandonment in point of fact existed; but they, on the contrary, considered, that the oysters were deposited in the place marked out by the owner of them, with reference to an ulterior use. No oysters, the court said, of the natural growth of the bay, had been found there for three years, and the bed interfered with no other sort of fishing, for either profit or pleasure; and they declared the case to be one which presented a deliberate and wanton violation of private property acquired by care and

industry, under the pretext of exercising a *right in common*.¹

Dredging for oysters in the bed of a common navigable river is illegal under 13 Rich. II. stat. 1, ch. 19. Therefore, where the declaration was in trespass *quare clausum fregit*; plea, that the *locus in quo* was part of a common navigable river, in which the public had a right to fish for oyster-spat; replication, that oyster-spat was the spawn or young brood of oysters, unfit for the food of men; rejoinder, that the public had the right of fishing for oyster-spat in a public river; it was held ill, on demurrer.²

It is, perhaps, scarcely necessary to observe, that although the right of fishery in tide and navigable waters, is a public and common right, and that hence when fish are taken, an absolute property in them is acquired by him who first takes them, riparian proprietors have the *exclusive* right to draw *seines* with fish on their own land.³ If an island, or a rock in tide water, be private property, no person, but the owner thereof has the right to use it for the purpose of fishing.⁴

¹ *Fleet v. Hegeman*, 14 Wend. (N. Y.) R. 42. And see *Rogers v. Jones*, 1 Ib. 237.

² *Mayor of Malden v. Woolvet*, 4 Per. & D. R. 26. The stat. of 13 Rich. 2, and 17 Rich. 2, c. 9, for the preservation of the fry or brood of fish are still in force, and the spawn of oysters, called oyster-spat, is within the provisions of these acts. *Mayor, &c. v. Woolvet*, 12 Ad. & Ell. R. 13.

³ *Lay v. King*, 5 Day (Conn.) R. 72; *Hart v. Hill*, 1 Whart. (Penn.) R. 124; and see *post*, Ch. VI.

⁴ *Commonwealth v. Shaw*, 14 S. & Rawle (Penn.) R. 9.

It is said by Lord Hale, in speaking of the tide waters of England, that although the *king* has “the primary right of fishing, in the sea, or creeks or arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where the king or some particular subject, hath gained a propriety exclusive of the common liberty.”¹ The principle here stated, as to the “public common of piscary belonging to the people” has not been questioned either in England, or in this country. The point upon which different opinions appear to have been expressed, in both countries, is whether, since Magna Charta, “either the king, or any particular subject, can gain a propriety exclusive of the common liberty.” In *Warren v. Mathews*,² Ch. J. Holt says, — “Every subject, of common right, may fish with lawful nets in a navigable river, as well as in the sea; and *the king’s grant cannot bar them thereof*.” Mr. J. Bayley, in *Blundell v. Catterall*,³ says, that many of the king’s rights are, to a certain extent, for the benefit of his subjects, and that “such is the case with the sea, in which all his subjects have the right of navigation and of *fishing*, and the king can make no *modern grants* in

¹ Treatise *De Jure Maris*, Harg. Tracts, 11.

² *Warren v. Mathews*, 6 Mod. R. 73; S. C. 1 Salk. R. 357.

³ *Blundell v. Catterall*, 5 B. & Ald. R. 91; App. p. i.

derogation of those rights." The same judge, in giving the opinion of the court of King's Bench, in another case, says, — "Fishery in a navigable river where the tide flows and reflows, which Sir William Blackstone calls a free fishery, could not be granted after Magna Charta."¹ The supreme court of the United States were of opinion, that the existence of a doubt as to the right of the king to make such a grant, after Magna Charta, is enough of itself, to show the fixed policy, in England, of carefully preserving the common right of fishery unimpaired for the benefit of the public.² On the other hand, it was considered in *Rogers v. Jones*, in the state of New York,³ that there is no prohibition in Magna Charta to the right of the king to grant a fishery, in navigable waters, to an individual, or body corporate; and that the object of the 16th chapter of that instrument was to prevent the king from putting any thing *in defenso* for his own recreation, except such as had been put in defence during the time of Hen. II.; that he was restricted as to the occupation of rivers for his pleasure, but at liberty to grant the land under navigable waters, within the realm, at his will and pleasure. The court accordingly decided, that the right of fishing in *Oyster Bay*, in the

¹ *Somerset v. Fogwell*, 5 B. & Cress. R. 875.

² *Martin v. Waddell*, 16 Peters (U. S.) R. 412; Opinion by Taney, Ch. J.

³ *Rogers v. Jones*, 1 Wend. (N. Y.) R. 237.

state of New York, belonged, not to the people generally of the state, but exclusively to the inhabitants of the *town* of Oyster Bay, derived by grant from the crown of England. The defendant in this case was sued for a penalty created by a by-law of the town, declaring, that no person, not being an inhabitant of Oyster Bay, shall be allowed to rake any oysters in the creeks or harbors of the town, under a certain penalty for each offence. He had entered the harbor or bay, and had caught and carried away a quantity of oysters, about one hundred yards from the beach; was a citizen of New York, but not an inhabitant of the town. The defence was put upon the ground, that the bay, being an arm of the sea where the tide ebbed and flowed, was a common fishery for all the citizens of the state, and that the inhabitants of the town possessed no exclusive right. The court decided, that the grant to the latter by Sir Ed. Andros, under Charles II., invested them with the right, and sustained the by-law, under which the penalty was inflicted.¹

The authority of the parliament in England to grant an exclusive right of fishery, will of course not be questioned. It is equally unquestionable, that the government of a state in this country may (subject to all constitutional restraints) abridge generally,

¹ That it is settled in England, that since *Magna Charta*, the king cannot abridge the common right of fishery in tide waters. See *ante*, Chap. I. p. 24 - 26.

or in favor of individuals, or of a private or municipal corporation, the common right of fishery, to the extent of its clearly expressed intention; and that, as a matter of internal police, it may enact laws regulating the modes and the times of fishing. In reference to the power of the legislature to regulate fisheries, Mr. J. Baldwin, in *Bennett v. Boggs*,¹ had occasion to remark, that it could not be maintained, as a legal proposition, that a mere permissive right of fishery is so solemn as to be incapable of restraint or regulation, by the sovereign power of a state; and that there was nothing perceivable, in the enactment of laws to that end, but the exercise of a legitimate power of sovereignty over its unquestioned domain. The grant of an exclusive right of fishing in tide waters, merely, within certain limits, creates an incorporeal, and not a territorial, hereditament; that is, it gives no corporeal right, or right of soil; though perhaps, generally, from the right of an exclusive or several fishery, ownership of the soil may be presumed.²

In Pennsylvania, the legislature and the courts have recognized an exclusive right of fishery to be in the riparian proprietors on the banks of the river Delaware, down to low-water mark, as a private easement existing by grant or sufferance. The men employed

¹ *Bennett v. Boggs*, 1 Bald. (Cir. Co.) R. 76.

² See *ante*, p. 33, 133, 137.

in carrying a rope attached to one end of the seine, may walk on the space between high and low-water mark ; and on the same space may place logs, or boards, or stone, to make what is called a " pound," into which to throw the fish when taken out of the net, and in that space to do all that has been usual and is necessary to the use of a fishery ; but the right to a fishery does not of itself imply a fee simple in such space, between high and low water opposite the fishery ; nor does it lessen or impair the right of the owner of land opposite, except so far as is necessary to the use of the privilege of the fishery. But this right, as before stated, is only an easement. The right of the riparian proprietor is not the same as to the main land above, for in high tide, or high floods, a vessel or raft may sail over it. The precise nature and extent of the rights of the states of Pennsylvania and New Jersey, in regard to the fisheries in the river Delaware, were settled in 1783, by an agreement between commissioners of the two states. In the first section of the instrument it is declared, that " the river Delaware, from the station point, or northwest corner of New Jersey, northerly to the place on said river where the insular boundary of the state of Delaware toucheth the same, in the whole length and breadth thereof, is, and shall continue to be and remain, a common highway, equally free and open to the use, benefit, and advantage of the said contracting parties : Provided nevertheless, that

each of the legislatures of the two states shall hold and exercise the right of regulating and guarding the *fisheries* on the said river Delaware, annexed to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted, during the season for catching shad, by vessels riding at anchor on the fishing ground, *or by persons fishing under a claim of right*, on said river." This compact is predicated on the idea of separate fisheries existing, inasmuch as it expressly stipulates, that the two states shall hold and exercise the right, of regulating the fisheries in the Delaware, annexed to their respective shores, in such manner that they shall not be liable to interruption during the season of fishing, under a claim of a *prima facie* common right. Neither state could grant, after this treaty, a common right in any part of the river, neither where the tide flowed and did not flow. But the act passed by both states of 1808-9 is still more explicit, and removes all possibility of doubt, as it expressly prohibits every person from throwing out a net above, or drawing it in, or even letting it swing below his own line on the upland. And this shows that private fisheries had long existed either by grant or sufferance.¹ It was accordingly decided in *Hart v. Hill*, just referred to, that an action will lie for a

¹ *Hart v. Hill*, 1 Whart. (Penn.) R. 124; *Bennett v. Boggs*, 1 Bald. (Cir. Co.) R. 60. And see *Ball v. Slack*, 2 Whart. (Penn.) R. 508; *Carson v. Blazer*, 2 Binn. (Penn.) R. 475, overruled, see *ante*, 134.

direct interruption of the private right, and such right may be devised by will, as an easement, or so much right of use of the shore, as is necessary for the purpose of a fishery. The acts of Pennsylvania and New Jersey, of 1823, authorizing the entry of a pool or fishing place with the clerk of the court of common pleas, and forbidding the use of a gilling seine or drift net by any person who has not made such entry, apply only to the owners of land on the shores of the river to which fisheries were annexed. Hence a person who has no title to such fishery as the owner of the land, is liable to the penalties for using such seine, &c., although he may have made an entry of the fishery.¹ The law, prescribing penalties to any person who uses a gilling seine or drift net, unless he has the right of fishing on the opposite shore, is not repugnant to the constitution of the United States.² In March, 1793, was passed in Pennsylvania an act for the sale of islands in the Delaware and Susquehanna rivers, which were to be appraised, in order to ascertain their value, having regard to the wood, distance from mainland, and to the advantages to be derived from the same in regard to fisheries.³

In 1771, an act was passed to regulate the fishery in the river Schuylkill. The first section relates to the practice which had grown up, of drawing several

¹ *Bennett v. Boggs, ub. sup.*

² *Bennett v. Boggs, ub. sup.*

³ *Hart v. Hill, sup.*

seines or nets in the same pool, or fishing place, and prohibits it. The second section defines a pool,—“so much of said river as extends from one side or bank, to the other side or bank thereof; and from the place where seines, or nets, have been usually thrown in, to the place where they have been usually taken out, shall be deemed and held, and is hereby declared to be, a pool or fishing place.” It is therefore so much of the *river*, which is the “fishing place,” and not so much of the *bank*. By the third section, it is provided, that when two or more persons residing opposite to each other, near the said river, on different sides thereof, may have suitable landing places on their respective shores, or an island opposite thereto, for taking seines or nets out of the pool or fishing place; it shall be lawful for such persons to fish with their seines alternately, and not otherwise; and the act then proceeds to direct how this shall be done. This act was to be in force five years, and was continued in 1776; and in 1785, a more full and particular act is found, the 4th and 5th sections being transcripts of the above 1st, and 2d. The 6th section provides, that “where two or more persons hold or occupy lands on the *same side* of the river, adjoining to any pool or fishing place, nothing herein contained shall be construed to prevent or deprive any such persons from enjoying the *privilege* of fishing in that part of the river, directly opposite their own land respectively as a *separate pool* or *fishing place*; the position of

which pool is to be by continuing the course of the division line or lines of the persons next adjacent; and every such division to be subject to the same rules and regulations as other pools and fishing places are by this act subject." This act contains several other provisions; and fixes periods at which they shall cease to fish for shad below the *falls*, and other places. In this act, the phrase, fishing for shad is first mentioned; and a day of the year when they shall cease to fish for shad. Here also are first found the words, "*privilege of fishing in that part of the river, directly opposite their own land respectively, as a separate pool or fishing place,*" and not as giving that right, but "*nothing in this act shall prevent or deprive any person of that privilege;*" recognizing such rights as then existing, and declaring that it was not meant to impair them.¹

By the early colonial ordinance of Massachusetts, of 1641, it was provided, that every inhabitant, who is a householder, shall have free fishing, in any bays, coves and rivers, so far as the sea ebbs and flows, within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them. This ordinance is a material deviation from the common law, and, although it was annulled with the *charter*, under and by virtue of which it was enacted,

¹ Ibid. *Carson v. Blazer*, overruled, see *ante*, p. 134.

it has since been adhered to as the common law of the state. The act seems, says Dane, so far to have varied the common law as to confine free fishing to a *householder*, and his right to the limits of the *town*; but, says he, whether the practice has been confined to person or place, is questionable.¹ It has been expressly held to be a part of the common law of the state, and derived from the ordinance referred to, that towns may appropriate the fisheries within the limits of the town, if they have not been appropriated by the legislature. If no appropriation be made, any citizen may appropriate the fish.² This local law of Massachusetts, with the origin, was recognized and applied by the court in the case of *Coolidge v. Williams*, by Parsons, Ch. J., in giving the opinion of the court. By the decision in that case, any town adjoining may appropriate the fish taken within its limits, and as the town on the opposite side of the river may have the same right, the limits must not include the tide waters ebbing and flowing, but the shores on which the fish are drawn and placed; when they may be said to be taken according to the intent of this privilege. If the fish, when caught swimming in the public tide waters, were to be considered as within the limits of any town, before they are haled on shore, it would

¹ Dane's Abr. 694.

² *Randolph v. Braintree*, 4 Mass. R. 315.

be difficult in many cases to define the interfering rights of towns situate on opposite banks ; and when the channel is not granted, fish swimming there out of the limits of any town would not be subject to appropriation. The power of appropriation only not meeting the wishes of many towns, acts have been passed authorizing them, not only to fix the time and manner of taking the fish, but also the places and the disposition of them when taken ; and to sell the exclusive right of fishing ; and guarding this authority by pecuniary penalties. And the place of fishing is understood to be that part of the shore used for employing *seines* and *nets*, or other engines, and for bringing the fish to land ; and not any part of the tide waters in which they were swimming.¹ If the state grant a tract of land adjoining a river, and the privilege of taking fish, to be held in common with other settlers, and afterwards such tract became incorporated as a town, the privilege of fishing within its limits becomes a corporate right, liable to be restrained and regulated by the legislature.²

The common law right of fishery in all rivers has been subject, in Massachusetts, immemorially to legislative control.³ By the statute of 1797, c. 75, cer-

¹ Per Parsons, C. J., in giving the opinion of the court in *Coolidge v. Williams*, 4 Mass. R. 140. And see *Freary v. Cook*, 14 Mass. R. 488 ; *Commonwealth v. Chapin*, 5 Pick. (Mass.) R. 199.

² *Nickerson v. Brackett*, 10 Mass. R. 212.

³ *Vinton v. Welsh*, 9 Pick. (Mass.) R. 87.

tain towns were authorized to sell the right of taking fish, within their limits, under certain regulations ; and it has been held, that the authority thereby given amounts to a franchise, which may be assigned or released.¹ The statute of 1818, c. 109, section 1, prohibits any person "to place or set any seine or net in and across Charles river," &c ; and where a seine was placed in the river, with one end attached to a boat fastened to a stake on one side, and the other end on the other side of the river held and drawn by men by a rope around a stake, it was held to be a violation of the act, and the penalty will be incurred although the seine does not extend quite across the river, and the time that the seine remains is immaterial ; all setting of seines in the river being unlawful.² The revised laws of Massachusetts prohibit the taking of oysters from their beds, destroying them or wilfully obstructing their growth, except by license from the selectmen, or by an inhabitant of the town, for the use of his family, from September to June 1 ; the taking, &c. of other shell-fish, in certain towns, with the same exception ; and exclude persons living without the state.³ All the acts of the legislature of Massachusetts, regulating the taking of fish, are for the benefit of the public, to preserve the

¹ *Watertown v. White*, 13 Mass. R. 477.

² *Watertown v. Draper*, 4 Pick. (Mass.) R. 165.

³ Mass. Rev. Stat. 392 - 539.

fish, and are public statutes of which the courts must, *ex officio*, take notice.¹

The regulation of fisheries, having been long exercised in Maine before its separation from Massachusetts, it has not since been forbidden; that is, the constitution of Maine does not render it incompetent for the legislature, to appropriate and regulate fisheries in tide waters, which would be otherwise public.² By the revised laws of Maine, no person living without the state shall set any net or seine or wear in any of the creeks, coves, or harbors of the state, for the purpose of taking salmon, shad, herrings or alewives. No person shall set any net crosswise in any such waters, but such net shall be set lengthwise. The selectmen of the town wherein oysters or other shell-fish may be found, may, in writing, authorize any persons to take the same at such times, and in such quantities, and for such uses as they shall think proper; and any inhabitant of such town, or native Indian within the state, may take the same without any permit, for the consumption of himself and family, excepting in the months of June, July and August. No person not living in the state shall take or destroy any lobsters without a permit from the selectmen. If any vessel, boat

¹ Burnham v. Webster, 5 Mass. R. 266; Commonwealth v. McCurdy, Ib. 324.

² Fuller v. Spear, 2 Shep. (Me.) R. 417; Lunt v. Hunter, 4 Ib. 9; Peables v. Hunneford, 6 Ib. 106.

or craft shall be found within the limits of any town or plantation, not owned therein, with any lobsters, oysters or other shell-fish on board, taken in such town, any inhabitant of such town may seize and detain such vessel, &c. for a time not exceeding forty-eight hours, in order that the same may be attached or arrested by due process of law, and secure the fines and forfeitures provided.¹

By a statute in Connecticut, for encouraging and regulating fisheries, it is enacted, that, — “when any person or persons have been at the expense of clearing a fishing place or places in Ousatonick river, between the mouth thereof and Leavenworth’s Ferry, and have constantly used the same for taking fish, in the season thereof, he or they shall be established in the full enjoyment thereof, *so long as he or they continue to use the same for the purpose of fishing*, in the proper season, and shall not be liable to any action for damages below high-water mark,” (*Stat.* 229, tit. *Fish.* s. 8). It was held, that under this section of the statute, the right of taking fish within the limits prescribed, in the above mentioned river, was a personal and unassignable privilege in those who acquired it by clearing and using the fishing place, and was limited in duration, in the enjoyment of it, by the same persons. Therefore, where A. and B. acquired a right of taking fish, under the

¹ Rev. Stat. of Maine, ch. 61, p. 304.

statute, by clearing and using a fishing place, executed a writing, not under seal, by which, for a valuable consideration, they released such fishing place to C. ; in an action brought by D., claiming under C. against E. for a disturbance ; it was held, that such writing was invalid, as a license, or transfer of any kind, and consequently was inadmissible as evidence of title in C.¹

The legislatures of other states have been accustomed to enact, modify, repeal and substitute both general and special laws in abridgment of the public right of fishery, though of much less importance than those above mentioned, in order that the public interest might be promoted by due regulations ; and in no case has the power to do so been called in question, with the exception of a highly important case, in the circuit court of the United States, for the third circuit comprising the districts of Pennsylvania and New Jersey.² This case arose under an act of the legislature of the latter state, and it involved questions under the constitution of the United States which renders the decision of much importance, and entitles the opinion of the court, as an exposition of state right under the federal constitution, to full attention. By the act of the legislature of New Jersey of the 9th June, 1820, it is declared, that from

¹ *Munson v. Baldwin*, 7 Conn. R. 168.

² *Corfield v. Coryell*, 4 Wash. (Cir. Co.) R. 371.

and after the 1st of May, till the 1st of September in every year, no person shall rake on any oyster bed in the state, or gather any oysters on any banks or beds within the same, under a penalty of ten dollars; that no person residing in or out of the state, shall at any time dredge for oysters, in any of the bays or waters of the state, under the penalty of fifty dollars. But the important section of the act, and the one which gave rise to the controversy in question, is the one which enacts, — “that it shall not be lawful for any person, who is not, at the time, an actual inhabitant and resident of this state, to gather oysters in any of the rivers, bays, or waters in this state, on board of any vessel, not wholly owned by some person, inhabitant of, or actually residing in this state; and every person so offending, shall forfeit ten dollars, and shall also forfeit the vessel employed in the commission of such offence, with all the oysters, and rakes belonging to the same.”¹ It was contended, that the seizure, condemnation, and sale of a vessel which was found engaged in taking oysters by means of dredges, and which was in pursuance of the act, was repugnant to the constitution of the United States, in the following respects: 1. To the power of Congress to regulate commerce among the several states. 2. To the

¹ In Delaware no person not a resident citizen shall carry away oysters, terrapins, or clams. Stat. of Delaware, 274, 552.

declaration, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. 3. To the declaration, that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction. Upon these several points, Mr. J. Washington delivered his opinion as follows: — “ The first question then is, whether this act, or either section of it, is repugnant to the power granted to Congress to regulate commerce? Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states. It is this intercourse which Congress is invested with the power of regulating, and with which no state has a right to interfere. But this power, which comprehends the use of, and passage over the navigable waters of the several states, does by no means impair the right of the state governments to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the constitution of the United States, even although such legislation may indirectly and remotely affect commerce, pro-

vided it do not interfere with the regulations of Congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and regulating turnpike roads, ferries, canals, and the like.

“ In the case of *Gibbons v. Ogden*, (9 Wheat. 1,) which we consider as full authority for the principles above stated, it is said, ‘ that no direct power over these objects is granted to Congress, and consequently they remain subject to state legislation. If the legislative power of the union can reach them, it must be for national purposes; it must be when the power is expressly given for a specified purpose, or is clearly incident to some power which is expressly given.’

“ But if the power which Congress possesses to regulate commerce does not interfere with that of the state to regulate its internal trade, although the latter may remotely affect external commerce, except where the laws of the state may conflict with those of the general government; much less can that power impair the right of the state governments to legislate, in such manner as in their wisdom may seem best, over the public property of the state, and to regulate the use of the same, where such regulations do not interfere with the free navigation of the waters of the state, for purposes of commercial intercourse, nor with the trade within the state, which the laws of the United States permit to be carried on.

“The grant to Congress to regulate commerce on the navigable waters belonging to the several states, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. But this grant contains no cession, either express or implied, of territory, or of public or private property. The *jus privatum* which a state has in the soil covered by its waters, is totally distinct from the *jus publicum* with which it is clothed. The former, such as fisheries of all descriptions, remains common to all the citizens of the state to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use. ‘Over these,’ says Vattel, (b. 1, c. 20, sect. 235, 246,) ‘sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used.’ ‘He may make such regulations respecting hunting and fishing, as to seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods.’ (Vattel, b. 1, c. 20, sect. 248.) The *jus publicum* consists in the right of all persons to use the navigable waters of the state for commerce, trade, and intercourse; subject, by the constitution of the United States, to the exclusive regulation of Congress.

“If then the fisheries and oyster beds within the territorial limits of a state are the common property of the citizens of that state, and were not ceded to

the United States by the power granted to Congress to regulate commerce, it is difficult to perceive how a law of the state regulating the use of this common property, under such penalties and forfeitures as the state legislature may think proper to prescribe, can be said to interfere with the power so granted. The act under consideration forbids the taking of oysters by any persons, whether citizens or not, at unseasonable times, and with destructive instruments; and for breaches of the law, prescribes penalties in some cases, and forfeitures in others. But the free use of the waters of the state for purposes of navigation and commercial intercourse, is interdicted to no person; nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the state.

“ It was insisted by the plaintiff’s counsel, that, as oysters constituted an article of trade, a law which abridges the right of the citizens of other states to take them, except in particular vessels, amounts to a regulation of the external commerce of the state.

“ But it is a manifest mistake to denominate that a commercial regulation which merely regulates the common property of the citizens of the state, by forbidding it to be taken at improper seasons, or with destructive instruments. The law does not inhibit the buying and selling of oysters after they are lawfully gathered, and have become articles of trade; but it forbids the removal of them from the beds in

which they grow, (in which situation they cannot be considered articles of trade) unless under the regulations which the law prescribes. What are the state inspection laws, but internal restraints upon the buying and selling of certain articles of trade? And yet, the chief justice, speaking of those laws, (9 Wheat. 203,) observes, that 'their object is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.' Is this not precisely the nature of those laws which prescribe the seasons when, and the manner in which, the taking of oysters is permitted? Paving stones, sand, and many other things, are as clearly articles of trade as oysters; but can it be contended, that the laws of a state, which treat as tortfeasors those who shall take them away without the permission of the owner of them, are commercial regulations?

"We deem it superfluous to pursue this subject further, and close it by stating our opinion to be, that no part of the act under consideration amounts to a regulation of commerce, within the meaning of the eighth section of the first article of the constitution.

"2. The next question is, whether this act infringes that section of the constitution which declares

that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?'

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by

the other citizens of the state ; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental : to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, *privileges and immunities*, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the union.'

" But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all *the rights* which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens ; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.

" A several fishery, either as the right to it respects running fish, or such as are stationary, such as oys-

ters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission, of the sovereign who has the power to regulate its use.

“This power in the legislature of New Jersey to exclude the citizens of the other states from a participation in the right of taking oysters within the waters of that state, was denied by the plaintiff’s counsel, upon principles of public law, independent of the provision of the constitution which we are considering, upon the ground, that they are incapable of being appropriated until they are caught. This argument is unsupported, we think, by authority. Rutherford, (b. 1, ch. 5, sect. 4 and 5,) who quotes Grotius as his authority, lays it down, that, although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which

all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other person can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. 'The sovereign,' says Grotius, (b. 2, ch. 2, sect. 5,) 'who has dominion over the land, or waters, in which the fish are, may prohibit foreigners [by which expression we understand him to mean others than subjects or citizens of the state] from taking them.'

"That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but

might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

"3. It is lastly objected, that this act violates that part of the constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The taking of oysters out of season, and with destructive instruments, such as dredges, is said to be an offence against the ancient ordinances and statutes of the admiralty, and that it is punishable by the admiralty as a misdemeanor. The authority relied upon to establish this doctrine is one of Sir L. Jenkins's charges, to be found in 2 Bro. C. & A. Law, 475.

"The amount of the argument is, that, since offences of this kind are cases of admiralty and maritime jurisdiction, the laws of a state upon the same subject, vesting in the state tribunals jurisdiction over them, are repugnant to this grant of jurisdiction to the judiciary of the United States.

"This argument, we think, cannot be maintained. For although the various misdemeanors enumerated by Sir L. Jenkins in his charges, may have been considered as admiralty offences at that period, either under the common law, or the ancient ordinances and statutes of the admiralty, it remains yet to be shown that they became such, and were cognizable

by the judiciary of the United States, independent of some act of the national legislature to render them so. Many of those offences are already incorporated into the criminal code of the United States, and no person, it is presumed, will question the power of Congress, by further legislation, to include many other offences to which the jurisdiction of the admiralty in England extended at the period above alluded to. But it is by no means to be conceded that, because offences of the nature we are now considering may rightfully belong to the jurisdiction of the English admiralty, the power of that government to regulate her fisheries being unquestionable, Congress has a like power to declare similar acts, or any acts at all, done by individuals in relation to the fisheries within the limits of the respective states, offences *against the United States*. There are doubtless acts which may be done upon the navigable waters of a state which the government of the United States, and that of the state, have a concurrent power to prohibit, and to punish as offences; such, for example, as throwing ballast into them, or in any other way impeding the free use and navigation of such rivers. But we hold that the power to regulate the fisheries belonging to the several states, and to punish those who should transgress those regulations, was exclusively vested in the states, respectively, at the time when the present constitution was adopted, and that it was not surrendered to the

United States, by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government. Indeed, this power in the states to regulate the fisheries in their navigable rivers and waters, was not, in direct terms, questioned by the plaintiff's counsel; and yet their argument upon this point, when followed out to its necessary consequences, amounts to a denial of that power.

“As to the ancient criminal jurisdiction of the admiralty in cases of misdemeanors generally, committed on the sea, or on waters out of the body of any county; we have very respectable authority for believing that it was not exercised, even if it existed, at the period when the constitution of the United States was formed, and, if so, it would seem to follow that, to the exercise of jurisdiction over such offences, some act of the national legislature to punish them as offences against the United States is necessary. We find from the opinions of learned and eminent counsel who were consulted on the subject, that misdemeanors committed upon the sea had never been construed as being embraced by the statute of 28 Hen. VIII. c. 15, and that the criminal jurisdiction of the admiralty, except as exercised under that statute, had become obsolete, so that, without an act of parliament, they could not be prosecuted at all. (2 Bro. C. & A. Law, Appendix, 519 to 521.) If then it could be admitted that Congress might legislate upon the subject of fisheries

within the limits of the several states, upon the ground of the admiralty and maritime jurisdiction, it would seem to be a conclusive answer to the whole of the argument on this point, that no such legislation has taken place; and consequently the power of the state governments to pass laws to regulate the fisheries within their respective limits remains as it stood before the constitution was adopted.”¹

In a subsequent case, in the same court, Mr. J. Baldwin, in referring to this opinion of his learned predecessor, gave to it his entire assent.²

¹ *Corfield v. Coryell*, 4 Wash. (Cir. Co.) R. 378-384.

² *Bennett v. Boggs*, 1 Bald. (Cir. Co.) R. 72.

CHAPTER VI.

OF RIPARIAN OWNERSHIP.

HAVING in the two preceding chapters treated of the two important public rights of *navigation* and *fishery*, and of their subjection to legislative authority, it is now proposed to consider in connection therewith, the private rights of riparian owners, as such, in the following order :

1. Right to the water as appurtenant to the upland.
2. Towing on the banks of navigable waters.
3. Landing, lading and unlading.
4. Right of way to the shore.
5. Drawing seines upon the upland.
6. Erection of fishing huts.

1. Riparian proprietors, it appears to be well settled, cannot be cut off from the water against their consent by any extraneous addition to their upland.¹

In a case in the circuit court of the United States, for the seventh circuit,² Mr. J. McLean says, in reference to the river Ohio, (which he puts upon the

¹ Ball v. Slack, 2 Whart. (Penn.) R. 538. And see Cortelyou v. Van Brundt, 2 Johns. (N. Y.) R. 357.

² Bowman's Devises v. Watham, 2 McLean (Cir. Co.) R. 376.

same footing as navigable tide waters) — “it is enough to know, that the riparian right on the Ohio river extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained, without the consent of the proprietor. He has the right of fishery, of ferry, and of *every other right* which is properly appendant to the owner of the soil; and he holds every one of these rights by as sacred a tenure, as he holds the land from which they emanate. The state cannot, either directly or indirectly, divest him of any one of these rights, except by the constitutional exercise of the power to appropriate private property for public purposes; and any act of the state, short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative and void, and can afford no justification to the grantee against an action of trespass.” The accumulation of land by alluvial formation on the bank of the Mississippi, did not cut off the right to a public landing place dedicated when the city was first established.¹ Where the water of the river Patapsco, in Maryland, contiguous to the plaintiff’s land, was made dry land by the defendant, by means of scow loads of sand, earth and stone, by reason whereof, as the declaration stated, the plaintiff’s land was deprived of the valu-

¹ *New Orleans v. United States*, 10 Peters (U. S.) R. 662.

able privilege of sailing with scows and boats to and from his land; the defendant was held liable for the damage.¹ In an action by the owner of a salt meadow above a dam on a navigable stream against the owner of the dam for obstructing the natural ebb of the tide, and thereby injuring the grass on the meadow, a verdict in the court of common pleas in Massachusetts was found for the plaintiff.² Where a corporation was authorized by the legislature to create water power by penning tide water in a full basin, and excluding the water from another basin which was to receive the water from the full basin through raceways; it was held, that the person who owned the flats in the receiving basin, suffered an injury, when the basin was excluded from the tide water, and he was thereby prevented from beneficially using his land, and therefore he was entitled to compensation.³ An ingenious device was once practised near Harrisburg, in Pennsylvania, of anchoring a raft, at a small distance from the shore, and converting it into a landing place;

¹ *Harrison v. Sterrett*, 4 H. & McHen. (Md.) R. 540 (in 1774). See also *Wilson v. Inloes*, 11 G. & J. (Md.) R. 351.

² *Turner v. Blodget*, 5 Met. (Mass.) R. 240 (*note*). The supreme court on appeal, dismissed the action, for *want of jurisdiction*, that court having original and exclusive jurisdiction in all actions respecting easements on real estate. *Ib.*

³ *Boston and Roxbury Mill Dam Corp. v. Newman*, 12 Pick. (Mass.) R. 467; and see *Baker v. Boston*, *Ib.* 184.

but the contrivance was rendered abortive by the verdict of a jury.¹

Persons interested in land, who are damnified by the extension of any public improvement, as a railroad, between them and the water, are entitled to compensation.² The case of *Bell v. The Hull and Selby Railway Company* is an important case upon this subject. By the Hull and Selby railway act, it is provided, "that where any part of any carriage, horse, or foot road, railway or tram road, quay, *wharf* or slope, or other *communication*, either public or private, shall be found necessary to be cut through, *or so much injured* as to be impassable or inconvenient, for carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandise, the company shall, at their own expense, before any such road, &c. shall be cut through, raised, sunk, taken, or injured, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., and for transporting, &c. of goods and merchandise, as the said road, quay, wharf, slope, or other communication, so to be cut through, raised,

¹ Per Yeates, J., in *Carson v. Blazer*, 2 Binn. (Penn.) R. 486. Fresh water rivers which are public highways, are put upon the same footing in that state, as "navigable" or tide rivers. *Ib.* And see *ante*, p. 76.

² As a general rule, parties interested in land not taken for a railroad, but so near as to be necessarily damnified by it, are entitled to compensation. *Dodge v. County Commissioners*, 3 Met. (Mass.) R. 380.

sunk, taken or injured, as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low-water mark, the defendants constructed their railway, (in the line prescribed by the act of Parliament,) thereby rendering the communication between the wharf and the river inconvenient and dangerous. It was held, that the plaintiff's wharf was thereby *injured*, within the meaning of this section, (which was not confined to any injury done *bodily* to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future temporary or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purpose of the act.¹ In Massachusetts (in which state riparian proprietors upon tide water, are entitled under the colonial ordinance of 1641, and the usage under it, to the *flats* opposite their lands, to the channel,) where the value of a wharf is impaired by the construction of a rail-road across the flats below the wharf, the owner of it is entitled to recover of the rail-road company the damages thus sustained by him.² The riparian proprietor, in virtue of the above

¹ Bell v. Hull and Selby Railway Co. 6 Mees. & Welsb. (Exchr.) R. 699.

² Ashby et al. v. Eastern R. Ro. Co. 5 Met. (Mass.) R. 368.

ordinance and usage, may, whenever he pleases, build and obstruct to low-water mark, and exclude all mankind.¹

2. By the civil law which prevails in the greatest part of Europe and in Louisiana, the privilege of *towing* on the banks of navigable rivers is embraced in the public right of navigation.² This is another of the respects in which that law is at variance with the common law. Bracton, it is true, has adopted the doctrine of the civilians, and his passage — *Riparum etiam usus publicus gentium sicut ipsius fluminis*—is plainly taken from Justinian, and though the same doctrine is quoted by Callis in his work on sewers, it is impeached by the otherwise unanimous current of authority. The little to be found in the books upon the subject, prior to the time of Lord Hale, he has collected, and after commenting upon it, he very evidently concludes that no such right as the one in question existed, inasmuch as he says, that where private interests are involved, they shall not be infringed without satisfaction being made to the party injured.³ The doctrine therefore of the civil law on this subject, conflicts with the principle of the common law, and with one of the character-

¹ Austin v. Carter, 1 Mass. R. 231.

² Just. Inst. L. 2, tit. 1, s. 4; Coop. Just. Tit. *De Usu et Proprietate Riparum*. The civil code of Louisiana follows the Roman civil law.

³ *De Jure Maris et Portibus*.

istics of the express written American constitutional law, that public convenience is to be viewed with a due regard to private property. The statute of 19 Hen. VII. c. 18, relative to the navigation of the river Severn, allows a towing path to the navigators upon making reasonable compensation for the inconvenience they may thereby receive ; and it therefore distinctly affords a negative to the idea of a common law right without compensation. In a modern case, by an act of Parliament, authorizing certain persons to make a certain part of the river Avon navigable, and to set out and appoint towing paths, it was required, that satisfaction should first be given to the owners of the land, and commissioners were appointed to settle by inquisition what satisfaction every person having a particular estate or interest therein, should receive for his respective interest.¹ But the question was brought directly before the king's bench in *Ball v. Herbert*,² whether, at common law, the public have the right of towing on navigable rivers ; and it was expressly decided, that they had not. Lord C. J. Kenyon said, he remembered when the case of *Peirse v. Lord Fauconberg* was sent to that court from the court of chancery, and it was then the current opinion in Westminster Hall, that the right of towing depended on *usage*, without

¹ *Bath River Navigation Co. v. Willis*, 2 Cases relating to Railways and Canals, 7.

² *Ball v. Herbert*, 3 T. R. 253.

which it could not exist. Some of the passages, he said, in Lord Hale, which seem to favor the common law right, are rather applicable to banks of the sea, and to ports.¹ The supreme court of Illinois, and that of Tennessee, have however decided, agreeably to the civil law, that the right of navigators was not limited to the bare privilege of floating upon the river Mississippi, but included the right to land, and to fasten to the shore, as the exigencies of the navigation may require; and that such was a burden upon the owner of the land, which he must bear as a part of the public easement.² Such, doubtless, had become established usage in respect to the great river in question, and if so, the decision is in accordance with the opinion of the court in *Ball v. Herbert*. It was observed by Lord C. J. Kenyon in this case, that "perhaps small evidence of usage before a jury would establish a right by custom, on the ground of public convenience."

3. Analogous to the right of *towing* on the banks of navigable rivers is the right of *landing, lading, and unlading* thereon. The latter right, as well as the former, exists by the civil law, and Bracton has

¹ See this case cited and approved by the judges in *Blundell v. Catterall*, 5 B. & Ald. R. 91, and App. p. i.

² *Middletown v. Pritchard*, 3 Scam. (Ill.) R. 520; *Corp. of Memphis v. Overton*, 3 Yerg. (Tenn.) R. 390. That the right of the public to tow vessels and boats upon the banks of navigable rivers, may be acquired by usage. See *Kinlock v. Nevile*, 6 Mees. & Welsb. (Eng. Exchr.) R. 794.

made it a part of his work *de legibus et consuetudinibus Angliæ*. He says, (*lib. 1, cap. 12, s. 6*) "that any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Though the case before mentioned of *Ball v. Herbert*, is not a distinct authority upon this point, as in that case the right of towing was claimed; yet the general question as to the right of the public on the *ripa* of a navigable river was discussed, and the court were of opinion, (as stated by Mr. J. Bayley¹) that the *ripa* of a navigable river was not *public juris*, and they therefore virtually overruled the authority of Bracton. Lord Hale, after citing Bracton, says, — "As touching ports and the public right to them, Bracton saith true; with this allay, that hath been before observed, that the law of England does thus far abridge that common liberty of ports, that no port can be erected without license or charter of the king, or that which presumes and supplies it, viz. custom and prescription." But in another passage² Lord Hale says, "Though A. may have the propriety of a creek or harbor, or navigable river, yet the king may grant there the liberty of a port to B., and so the interest of the propriety, and the interest of the franchise, several and divided. And in this, no injury is at all

¹ In *Blundell v. Catterall*, 5 B. & Ald. R. 91, and App. p. xxxiv.

² In his *Treatise De Portibus Maris*, p. 84.

done to A., for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any one to pass in it against all but the king, (for it was *public juris*, as to the matter before) so now the king takes off that restraint, and by his license and charter, makes it free for all to come and unlade." "But," says Lord Hale, "If A. hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or ripa without his consent, unless custom had made the liberty thereof free to all, as in many places it is; *for that would be a prejudice to the private interest of A. which may not be taken from him without his consent.*"¹ If there be, says Mr. J. Bayley, after citing this passage, in *Blundell v. Catterall*,² such a distinction, what becomes of the authority of Bracton, where he says, "*Riparum etiam usus publicus, est jure gentium sicut ipsius fluminis?*" The learned judge then adds, — "No man can travel through this kingdom along the banks of rivers, without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of Bracton."³ In the same case Mr. J. Holroyd says, — "It was not by the common law, nor is it by statute,

¹ *Ib.* p. 73.

² *Ubi. sup.*

³ Abbott, C. J., in the same case comments in the same manner upon the authority of Bracton, and considers it overruled.

lawful to come with, or land, or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, where the shore or land adjoining is private property, unless upon the person's own soil, or with leave of the owner thereof, who Lord Hale¹ says, may, in such case, take amends for the trespass in unloading upon his ground." In case of *necessity*, as that author says, either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. But this is plainly not consistent with a general right, as being in the public, or the right of landing and unloading upon the land of the riparian proprietor, *ad libitum*. The supreme court of Pennsylvania have referred to that author upon this subject, and they have said, that originally in England, as in Pennsylvania, goods might be landed any where, *on permission from the owner of the adjacent soil*; and that now, in both countries, on account of revenue, ports of entry are established, at which alone certain goods can be legally landed, except in case of storm or distress.²

In Pennsylvania, (in which state all inland fresh water rivers which by the common law are "public highways" are considered as "navigable" according

¹ *De Portibus Maris*, p. 51. Landing for any purpose on another's land is a trespass. *Gray v. Bond*, 2 B. & Bing. R. 667, and 6 Eng. Com. Law R. 308.

² *Ball v. Slack*, 2 Whart. (Penn.) R. 530.

to the technical meaning of the term,¹) it has been held, that the owner of a private ferry over the river Monongahela, has no right to land boats and passengers at the *terminus* of a public highway, between high and low-water mark on the opposite margin of the river, without the consent of the owner of the soil. The *locus in quo*, said the court in this case, was the *terminus* of a public road on the margin of the river; and there was not even a public ferry to give color to the pretence of a right to use the shore as a landing or wharf for the mooring of boats.² It has been further decided in Pennsylvania, that an act of assembly authorizing J. S. to establish a ferry over the Youhiogany river, and all other acts of the legislature of that state, show the uniform opinion of the legislature to have been, that to enable a person to keep such ferry, he must either hold the ground where the landing place is made, or obtain the consent of the owner of the land for that purpose.³ The right to land and unlade upon the banks of a navigable river, without consent, was first agitated in that

¹ See *ante*, p. 76.

² *Chess v. Manown*, 3 Watts (Penn.) R. 219. The right of exclusive navigation of a public river, either transversa or otherwise, is susceptible of exclusive occupation only by grant from the public to whom it belongs; but the owners of the shores have the power to control the subservient and indispensable right of embarkation and landing, at the *terminus* of a public road. Per Gibson, C. J., in giving the opinion of the court in *Bird v. Smith*, 8 Watts (Penn.) R. 434.

³ *Cooper v. Smith*, 9 S. & Rawle (Penn.) R. 26.

state, in *Chambers v. Furey*,¹ where the act above mentioned was relied on as evidence of legislative construction, that there is no right or custom in the state, by which one man can land or receive freight on another's freehold, without the consent of the owner of such freehold, on the banks of navigable rivers. The right of the bed and soil of navigable waters, is presumed to be in the state; but in Pennsylvania, the right to the soil as far as there is a navigable channel, vests in the owner of the adjoining land; and hence arises the private right to wharves in the city of Philadelphia, which no one can use without making compensation to the owner.² No further right was conveyed to a devisee in a will, by the words "I give my fishing place," &c. in the soil on the bank of the river, than a right to so much of the soil as was necessary for the purpose of fishing.³

In *Post v. Pearsall*, in the court of errors of the state of New York,⁴ the action was trespass for entering upon the land of the plaintiffs, prostrating his fences, and depositing a quantity of manure. The defendant pleaded not guilty, and gave notice with his plea, that he would give in evidence in bar of a recovery, that at the time when, &c. and long before,

¹ *Chambers v. Furey*, 1 Yeates (Penn.) R. 167.

² *Cooper v. Smith*, *wb. sup.*; and see the following chapter as to wharves.

³ *Hart v. Hill*, 1 Whart. (Penn.) R. 124.

⁴ *Post v. Pearsall*, 29 Wend. (N. Y.) R. 425.

there was and had been, on the close of the plaintiff a public highway and *landing*, on the east side of Hempstead harbor for all the inhabitants of the state of New York to go to, and to deposit, load and unload manure and other materials, at their free will and pleasure. It was held, that the public have not the right, *against the will of the owner*, to use and occupy his soil adjoining navigable waters, as a *public landing*, and place of deposit of property in its transit to and from vessels navigating such waters, although such *user* had continued upwards of twenty years with the knowledge of the owner. The supreme court, when this case was before them, held that the doctrine of *dedication* of highways, streets, &c. did not extend to *public landings*; and the judgment of the court was affirmed in the above case in the court for the correction of errors. Opinions were delivered by five of the members of the court; four for affirmance, and one for reversal of the judgment of the supreme court. The chancellor, and senators Edwards and Livingston, held, that the principle of *dedication* of highways and of streets and public squares in cities and villages did not extend to *public landings*, and therefore they were in favor of affirming the judgment below. Senator Verplanck, although concurring in the judgment of affirmance, held that the principle of dedication of highways and streets applies to every use or easement in land, which can be of any service, convenience or pleasure

to the community at large, and that consequently public landing places are the subject of dedication. He however further held, that *user alone*, though admissible as evidence *in corroboration* of other proof of *actual dedication* by the declarations or acts of the owner of the soil, is not enough in itself to warrant the presumption of the dedication of easements, other than of highways, streets and places in the nature of public ways. Senator Furman agreed with senator Verplanck as to the extension of the principle of dedication ; but went further, and held, that proof of a *continued user* by the public of the soil of another for the term of *twenty years* for any beneficial purpose, with the knowledge of the owner, is sufficient to warrant the presumption of a dedication, unless rebutted by evidence on the part of the owner that he was permitted by mere license, revocable of course at the will of the owner, or by other evidence showing the absence of intention on his part to dedicate the land to public use, so as to deprive himself of the power of dedication.

In Massachusetts, landing places have existed, in some instances, on the banks of creeks and rivers, by immemorial usage.¹ The public use and enjoyment of a landing place by the inhabitants of other towns, as well as those of the town in which it is

¹ *Keen v. Stetson*, 5 Pick. (Mass.) R. 492 ; *Green v. Chelsea*, 24 Ib. 80.

situated, long enough continued, and without any interruption or objection, is sufficient, it has been held in Massachusetts, to establish a right in all the inhabitants of the commonwealth.¹ The use by the individual inhabitants of a town, of land for a landing place, does not tend to show a possession by the town in its corporate capacity, but, on the contrary, is adverse to the claim of such possession.² In one case in the supreme court of that state, the facts and the opinion of the court thereon, were given by the court, in substance, as follows. The place where the nuisance is alleged to be erected, was laid out by the town of Dorchester in the year 1658 as a *common landing place*. It was not stated to have been laid out for the particular benefit of the town ; and if it were, upon the incorporation of the town of Milton the inhabitants of the several towns composing Dorchester when it was thus appropriated, would retain their right to use it, and this would constitute it a public landing place. The inhabitants of Milton have exercised acts of ownership over it ; for Dorchester having laid it out without designating it to be for the use of that town only, it is to be considered as laid out for the public convenience ; and the public had a right to use it until it should be discontinued by proper authority. Common landing

¹ Coolidge v. Learned, 8 Pick. (Mass.) R. 504.

² Green v. Chelsea, 24 Pick. (Mass.) R. 71.

places are recognized by statute, and provision is made for abatement of nuisances on them. The statute (1786, c. 67), however, contains a provision in favor of persons who have encroached and have had possession for a certain number of years; and so much of this land as has been occupied by houses for the time mentioned in the statute, the public do not attempt to meddle with; but with the rest Milton has no particular right. It was contended, that the landing place in question was a town way, and that such way might be discontinued by the town in which it is situated. But the court thought it something distinct from a way. No express authority had been given to towns to discontinue town ways, but without doubt such authority exists by implication, towns having power to make new ways which would render old ways of no use. But a public landing place is not within their power; and although some landing places may become of no use, the authority to discontinue them is in the legislature.¹

When New Orleans was established as a town, the country was under the jurisdiction of the "Western Company," and the dedication to public use was made by it of a vacant space of land lying on the river Mississippi, designated on the maps of the town, which were made, by the name of *quay*. This vacant space had been used for the commercial pur-

¹ Commonwealth v. Tucker, 2 Pick. (Mass.) R. 44.

poses to which it had been appropriated ; with but occasional and slight interruptions to small portions of it ; from the establishment of the designation of the *quay* in 1724, until 1836. The interruptions were of a temporary nature, and were permitted where private accommodation was in some degree connected with the public convenience. The interruptions were not such as deprived the public of the dedication.¹

¹ *New Orleans v. United States*, 10 Peters (U. S.) R. 662. The equitable owners of a tract of land on the river Ohio (the legal title to which was granted to John Cleves Symmes, from whom they had purchased the land before the emanation of the patent from the United States) proceeded in January, 1789, to lay out part of the said tract into a town, now the city of Cincinnati. A plan was made and approved of by all the equitable proprietors, and according to which the ground lying between Front street and the river was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry ; and no lots were laid out on the land thus dedicated as a common. Afterwards the legal title to the land became vested in the plaintiff in ejectment, who, under the same, sought to recover the premises so dedicated to public use. It was held, that the right of the public to use the common must rest on the same principles as the right to use the streets in Cincinnati ; and that the dedication, when the town was laid out, gave a valid and indefeasible title to the city of Cincinnati. No particular form or ceremony, it was held, is necessary in the dedication of land to public use ; and all that is required is *the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation*. *City of Cincinnati v. Lessee of White*, 6 Peters (U. S.) R. 431. In another case in the same court, the plaintiffs in error, (defendants in ejectment in the circuit court) claimed for the city of Pittsburgh, a slip of land lying on the bank of the river Monongahela, near the junction of that river with the river Alleghany, being a space between the southern line of the lots of the city, and the

4. The foregoing authorities would seem to be conclusive against a *prima facie* public right of way to

Monongahela river. It was contended by them, that this slip of land was dedicated by the surveyor, when he laid out the town to the public, for streets and other public uses. The depositions of witnesses, who were present when the ground on which the city stands, was laid out in lots by the surveyor, authorized so to do by the proprietors of the land, were offered to prove declarations of the surveyor, made to persons assembled at the survey, and who occupied part of the ground so laid out; by which declarations and other acts of the surveyor, also proposed to be proved, it was contended the said dedication was made; that is, that he had observed, that "the street," the slip of land, "to low-water mark, should be for the use of the citizens and the public forever." By the court: The surveyor had authority to fix upon the plan of the town and survey it. He had the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on every thing so far as related to the town, and its beauty, convenience and value. These were clearly within the scope of his powers, as they were essentially connected with the plan of the town on which he was authorized to determine at his discretion. The proof of such declarations should have been admitted by the circuit court; because, under the circumstances, they formed part of the transaction. *Barclay et al. v. Howell's Lessee*, 6 Peters (U. S.) R. 498. In some cases, the dedication of property to public use, where the public has enjoyed the unmolested enjoyment of it for six or seven years, has been deemed a sufficient dedication. If the ground in controversy, had been dedicated to a *particular purpose*, and the city authorities had appropriated it to an entire different purpose, it might afford ground for the interference of a court of equity to compel a specific execution of the trust. But even in such case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant. *Ibid.* The two foregoing cases were examined, and the principles upon which they were decided, were considered, approved and affirmed in the case of *New Orleans v. The United States* (10 Peters, R. 662). In this case, it was held,

navigable waters by the common law. Rights of way are considered acquirable by use, express grant, or by virtue of *necessity* arising from a grant of land to which access can only be had over other land of the grantor. On the latter ground, it might perhaps be argued, that a common liberty of passing over land which is private property to a valuable public fishing place in an arm of the sea, or on the border of the sea itself, may legally be asserted. It has indeed been not infrequently suggested, that the law would not allow to every man the right to fish in the sea, &c., and at the same time deny to him the means of getting there. It should however be recollected, that whenever a way is claimed by *necessity*, it is a good plea that the plaintiff has *another* way. It is moreover reasonable to presume, that if a public right of way over estates adjoining to, or in the proximity of tide waters, did exist at common law as incident to the public right of fishery, or of the right of navigation, it would have been treated

that in order to dedicate property for public use, in cities and towns, and other places, it is not essential, that the right to use the same shall be vested in a corporate body. It may exist in the public, and have no other limitation than the wants of the community at large. If buildings have been erected on the lands within the space dedicated for public use, or grants of part of the same have been made by the power which had authority to make, and had made a dedication of the same to public use; the erection of the buildings, and the making of the grants would not be considered as disapproving the dedication, and the grants would not affect the vested rights of the public. *Ib.*

of, and in some degree defined. It is said by an old authority, it is true, that "the fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishery is for the commonwealth, and for the sustenance of all the kingdom."¹ But in Brooke's *Abr. tit. Custom*, the case cited in support of this proposition is more fully stated, and shows that the doctrine was laid down on a question which arose upon a *custom*. Mr. J. Holroyd, in *Blundell v. Catterall*, just referred to below, regarded it as proceeding entirely from a particular custom, and so was it regarded by Lord Hale.² In the case just mentioned, it was expressly decided by the court, that where an individual had acquired an exclusive right to the shore, by grant, the defendant was liable for passing over it with vehicles for bathing, from some place above high-water mark, on the ground of the private ownership of the shore.³ One of the topics urged at the bar in favor of the supposed right, was *public convenience*, but it was replied by Abbott, C. J., that such a view should be taken with a due regard to *private property*.⁴

Under the local law of Massachusetts, which was considered in the preceding chapter, by which towns

¹ Fitzh. Barre, 93, referring to the Year Book, 8 Ed. IV. 19. This authority adduced and overruled by Holroyd, J., in *Blundell v. Catterall*, App. p. xxiii.

² *De Juris Maris*, Harg. Tracts, 86.

³ See *ante*, Chap. I. p. 28-33.

⁴ *Blundell v. Catterall*, App. p. xxxviii.

may appropriate the fish, if not appropriated by the legislature, no man, says Parsons, C. J., can lawfully go on the soil of another, without his leave; and if no such appropriation has been made, any citizen, may take the fish, "so that he does not trespass on the land of others."¹ In a very early case in the same state, the defendant claimed the right of going over the plaintiff's land to the river Merrimack, but he relied solely on prescription.² In South Carolina, where a person living on an island had a navigable watercourse from his own door to the highway, of no greater distance than to pass through his neighbor's field, the court held, that it was not such *necessity* as gave him a right of way over the field.³ In *Cortelyou v. Van Brundt*, in New York,⁴ it was held that the common right of fishing in tide waters, gives *no* power of the adjoining land.

Both commerce and fishing, therefore, and bathing in the sea, although they are matters favored by the common law, by reason of public and national benefits to be derived from them, do not, because the waters of the sea are open to all persons for all lawful purposes, afford a universal right of access to them over land which is private property.⁵

¹ *Coolidge v. Williams*, 4 Mass. R. 440.

² *White v. Whitier*, 2 Dane's Abr. 702.

³ *Lawton v. Rivers*, 2 McCord (S. C.) R. 445, cited in 2 Rice, Dig. 356.

⁴ *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) R. 357.

⁵ See *Blundell v. Catterall*, App. p. i.

5. The riparian proprietor has the *sole* right, unless he has granted it, of fishing with *nets* or *seines* in connection with his own land.¹ Thus, in *Lay v. King*, in the supreme court of errors of Connecticut,² it was expressly held, that an adjoining proprietor on the river Connecticut, near its mouth, had an exclusive right to draw a seine on his own land; though the right of fishery in that part of the river was free and common to all the citizens of the state. This exclusive right is considered to give all the owners of land on the margin of the river Schuylkill such great advantages, that it has been hardly worth while for any other persons to attempt to fish with seines. The right of property on front of that river is therefore valuable, and is called a fishery, and one which, in some spots, is rented for a considerable sum annually.³ Where certain persons had landed, with their nets, on the bank of a navigable river, and had, at various times, dressed and improved the landing place, it was held, that it was properly left to the jury to *presume* a grant of the right of landing for that purpose, by the owner of the shore. It was remarked in this case, by Burrough, J., that every act done by the plaintiffs for *forty-six years*, on the

¹ *Hart v. Hill*, 1 Whart. (Penn.) R. 138; *Coolidge v. Williams*, 4 Mass. R. 140; *Brink v. Richtmyer*, 14 Johns. (N. Y.) R. 255.

² *Lay v. King*, 5 Day (Conn.) R. 72.

³ Per Tilghman, C. J., in delivering the opinion of the court in *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle (Penn.) R. 71.

locus in quo, would have been a trespass, if they had not a right of landing with their nets there; but from 1774, to the present time, all these acts had been done openly; and the only question was, whether there were any facts from which a judge could leave it to a jury to presume a grant of the right in question; and undoubtedly, the circumstances were such as could scarcely have occurred without the knowledge of the owner.¹

6. The right of landing with, and drawing, seines upon another's land, is undoubtedly an *easement*,² and therefore, as in the case just above referred to, may be acquired by prescription, like a right of way. Such, however, is not the case with the erection of a building on the land of a riparian proprietor, like a *fishing hut*, for that is an exclusive appropriation of the land. An action of trespass *quare clausum fregit* was brought for entering and digging up the soil and erecting a *hut* on the plaintiff's close, in

¹ *Gray v. Bond*, 2 Brod. & Bing. R. 667, and 6 Eng. Com. Law R. 368. At all the fisheries in the river Tweed, the workmen exercise the right of walking over and along the adjoining shore, while drawing their nets from the river. They also exercise the right of drawing their nets on the adjacent banks, called "a net green." But this right is considered as a mere easement, which may be presumed by twenty years' enjoyment. 28 Lond. Law Mag. 337; and see 3 Mees. & Welsb. (Exr.) R. 229; 4 Ib. 256, 496; 5 Ib. 233; 6 Ib. 795. Acts of Parliament have from time to time been passed in England to give parties engaged in the herring fisheries a right to use the adjoining lands in certain cases. 1 Jac. I. 23; 29 Geo. II. c. 23, s. 2; 30 Geo. II. c. 30, s. 7; 11 Geo. III. c. 31, s. 11.

² *Hart v. Hill*, 1 Whart. (Penn.) R. 138.

New Utrecht, in King's county, in the state of New York. The defendant offered evidence in support of a custom, in the inhabitants of New Utrecht, and in citizens of the state, to fish in the bay adjoining the *close*, and to use and occupy the shore for that purpose. The court considered, that if the facts in support of the custom were admitted, they did not amount to a justification in erecting the *hut*, as the right to fish in any water gave no power over the land. The erection of the hut was a mark of title, and of exclusive enjoyment, and that prescription in no case would give a right of erecting a building on another's land. The principle, the court held, was the same, whether the right claimed be considered as strictly a custom, or prescription, as the only material distinction between them is, that one is local and the other personal in its nature; and prescription only applied to incorporeal hereditaments.¹ Upon this subject the common law is at variance with the civil law, for by the latter any individual had permission to erect a fishing hut on the shore to subserve the purpose of fishing—*cuilibet liberum est casam ibi ponere in quam se recipiat*.²

¹ Cortelyou v. Van Brundt, 2 Johns. (N. Y.) R. 357. See also Jacobson v. Fountain, Ib. 170, and the opinion of Holroyd, J., in Blundell v. Catterall, App. p. xxi. A colony law of Massachusetts of 1646, reciting, that foreign fishermen had been accustomed to use unsettled harbors and places, and to take wood and timber at their pleasure, forbids fishermen to enter on lands granted to any town or person, without leave, unless employed by an inhabitant. 2 Dane's Abr. 707.

² Inst. L. 2, t. 1, s. 1. And see *ante*, Chap. I. p. 18.

CHAPTER VII.

OF PURPRESTURES, WHARVES, QUAYS, PIERS, &c.

IN the preceding chapter we have considered the rights of the public in tide waters, and in the soil and shores thereof, as they affect or not, the rights of riparian proprietors, as such ; and we now proceed to consider the rights of the latter, by virtue of their riparian ownership, as they affect or not, the rights of the public.

From the period of the first settlement of this country, to the present, the necessity of wharves, quays, piers, &c. has existed for the loading and unloading of boats and vessels ; and for such purposes, the appropriation of the soil below the ordinary high-water mark, by extraneous additions to the upland, has been found indispensable. It is well known, that in the respective states, which lie along the margin of the Atlantic, there are many places where the tide ebbs and flows, (and which, therefore, according to the strict rule of the common law, are public,) that are of no navigable use, and in their original condition, without the aid of art and industry, afford to the public not the slightest advantage of any kind. Flats, marshes, and other ground, which are covered with water only at full tide, are

places of this description. The detriment which the community receive from the recovery, private appropriation, and occupation of such soil, is obviously but little, if any. So far from it, the result has proved that the public are thereby, in a very considerable degree, the gainers; as they are thus accommodated with landing places, which are essential to every commercial depot, and are also accommodated with new thoroughfares, streets, avenues, &c. Indeed, among the multitude of improvements and works of art of a public nature, which command observation in the towns and cities of the Atlantic states, are the artificial embankments which have been made by enterprising individuals, or corporate companies, in and upon the soil which, in its natural condition, would, at low water, have exhibited nothing more attractive or valuable, than the offensive spectacle of an extensive *waste*. It is a practical truth, that the mud-flats in the delta of the river Mississippi, and around the Gulf of Mexico, must be reclaimed for the *furtherance* of navigation. A part of the city of Mobile stands on land once subject to the flow of the tide; and at New Orleans, where the tide ebbs and flows, navigation is facilitated by similar means.¹

By the civil law, to repair and strengthen the banks of public rivers is permitted as being most

¹ See opinion of Catron, J., in *Pollard's Lessee v. Hagan et al.* App. p. cxliii.

useful, provided it does not impede the navigation.¹ Against one who projects a mole into the sea, the *interdictum utile* lies by one who is thereby injured, but if no one sustain injury, he who builds on the seashore, or projects a mole, is protected.² But inasmuch, as in England, the right of property in tide waters, and in the soil thereof is, by the common law, in the king,³ and, in this country, in the state,⁴ the king or the state may abate every intrusion thereon, whether the same be a nuisance to the navigation or not. Such an intrusion is denominated a *purpresture* (more properly *pourpresture*), a word derived from the French word *pourprise*; which word, according to Lord Coke, signifies a close or inclosure, that is where one encroacheth, or makes that several to himself which ought to be common to many.⁵ The old writers say, that it might be committed either against the king, the lord of the fee, or any other subject; but in its ordinary acceptation, at the present day, it means any encroachment upon the

¹ Ripus fluminum publicorum reficere, munire, utilissimum est, damne ob id navigatio deterior fiat: illa enim sola refectio toleranda est, quæ navigationi non est impedimento. *Dig. L. 43, t. 15, s. 1.*

² Adversus eum qui molem in mare projecit, interdictum utile competit ei, cui forte hæc res nocitura sit; si autem nemo damnum sentit, tuendus est is, qui in littore ædificat, vel molëm in mare jactit. *Dig. L. 43, t. 8, s. 8.*

³ *Ante*, Chap. I.

⁴ *Ante*, Chap. II.

⁵ 2 *Inst.* 38.

sovereign, either in highways or streets, or rivers or harbors.¹ Such encroachment may, or may not, be a public nuisance. Whether it be a public nuisance or not, is a question of fact. Thus, in speaking of nuisances to ports, Hale says, — “It is not every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto*, in law, a nuisance. For that would destroy all the keys that are in all the ports in England; for they are all built below the high-water mark; for otherwise, vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto*, it were a common nuisance, because it straitens the port; for the king cannot license a common nuisance.² Indeed, where the soil is the king’s, the building below the high-water mark is a *purpresture*, an encroachment and intrusion upon the king’s soil, which he may either demolish, or seize or arrent, at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation. In case, therefore, of building within the extent of a port in or near the water, whether it be a nuisance or not

¹ Eden on Injunct. 259, who cites Skene, *Verbo Pourpresture*, and refers to Beames’s note to Glanville, lib. 9, c. 11, p. 239, Spelm, Gloss., *Purpresture*.

² See *ante*, Chap. I. p. 23 – 28.

is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*.”¹

A wharf, or pier, or other erection may, therefore, be below high-water mark, or even below low-water mark, and be not necessarily a nuisance, though a purpresture. The remedy for a purpresture, it is laid down, is either by information of intrusion, at common law, or by information, at the suit of the attorney-general, in equity.² The judicial department of the English court of exchequer is divided into one of equity and one of law; and the primary business of the former is to recover any lands belonging to the crown; so that purprestures upon arms and creeks of the sea are the proper subjects of information in the court of exchequer.³ The king's attorney-general on the part of the crown, may proceed for the purpose of protecting either the *jus privatum* of the king from the purpresture, or the *jus publicum* of the subject from nuisance, by information on the king's remembrancer's side of the exchequer, by English bill, praying a personal decree against the defendant in the suit. The question of nuisance, as above stated, is *matter of fact*, which the court of exchequer may determine on evidence,

¹ Hale, *De Jure Maris*, Harg. Tracts, 85.

² Eden on Injunct. 260.

³ Attorney General v. Richards, 1 Anst. R. 606; Attorney General v. Johnston, 2 Wils. Ex. R. 101.

or the court may direct an issue.¹ If the erection complained of appear to be a mere purpresture, or without being at the same time a nuisance, the court may direct an inquiry to be made, whether it is more beneficial to the crown to abate the purpresture, or to suffer the erection to remain and be ar-rented; but if the purpresture be *also* a public nuisance, this cannot be done, for the reason before assigned, that the crown cannot sanction a public nuisance.² There are several early cases upon the subject in the exchequer, some of which are cited by Lord Hale in his treatise *De Portibus Maris*, in which purprestures, which were also nuisances, had been committed, and decrees were made upon the application either of the attorney-general, or the grantees of the crown, to abate them.³ Upon these authorities, the court of exchequer proceeded in the year 1795, where the defendants had erected certain buildings between high and low-water mark, in the harbor of Portsmouth, so as both to prevent the boats and vessels from sailing over the spot, or mooring there; and also to endanger the further

¹ Attorney General v. Parmeter, 10 Price, R. 378 - 411; Attorney General v. Burridge, Ib. 350 - 377. And see *ante*, Chap. I. p. 26, 27.

² Story, Eq. Juris. 233, s. 922; Attorney General v. Richards, 1 Anst. R. 603; Attorney General v. Johnston, *sup*.

³ Attorney General v. Philpot, 8 Car. I. cited 2 Anst. R. 607; City of Bristol v. Morgan, Hale, *De Portibus*, &c.; Town of Newcastle v. Johnson, Ib.

damage of the harbor, by preventing the free current of the water to carry off the mud. The bill filed prayed, that the defendants might be restrained from making any further erections, and that those might be abated, and a decree was made accordingly.¹ The same thing was also done with regard to Bristol harbor;² and an injunction was granted *ex parte* on affidavits, to restrain a purpresture and nuisance upon the river Thames.³

The right of the crown in navigable waters is two-fold, the right of property, and the right of conservation; and these rights are perfectly distinct, and may be transferred and separated. The right of conservation of a river may be given to the corporation of a city so far as the tide flows, but they are not thus made owners of the soil or bed of such river. And the ownership of soil, and the license of conservation, are not sufficient to legalize an erection

¹ Attorney General v. Richards, 2 Anst. R. 603.

² Bristol Harbor Case, cited 18 Ves. R. 214.

³ Attorney General v. Johnston, 1 Wils. Ex. R. 87. See also the cases of Attorney General v. Parmeter, and Attorney General v. Burridge, cited *ante*, Chap. I. p. 26, 27. 2 Story Eq. Juris. s. 921, 922. Story refers to the following authorities on the subject: Attorney General v. Forbes, 2 Mylne & Craig, R. 123; Ripon (Earl of) v. Hobart, 3 Ib. 169, 179; Attorney General v. Cleaver, 18 Ves. R. 217; Crowder v. Tinkler, 19 Ib. 620; Barnes v. Baker, Amb. R. 158; Mohawk Bridge Co. v. Utica and Schen. R. Ro. Co. 6 Paige (N. Y.) Ch. R. 554; Attorney General v. Cohoes, Ib. 133; Trustees of Watertown v. Cowen, 4 Ib. 510, 515. And see as to remedies for obstructing navigation, *ante*, Chap. IV. p. 117-119.

in a tide river; for the question of nuisance or not, may still be raised, and may be tried by indictment. The coal staiths, indicted, in the case of *Rex v. Russell*,¹ were erected under a license from the mayor and burgesses of Newcastle, but that was not thought sufficient to legalize them, on the trial of an indictment for a nuisance in a navigable river by erecting an embankment in the water way, and a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty.

It is no defence in an indictment that although the work be in some degree a hindrance to the navigation, it is advantageous, in a greater degree, to other uses of the port; although a slight, uncertain, and contingent injury to navigation, will not sustain a verdict of guilty.² On an indictment for a nuisance, it was proved, on the part of the prosecution, that the wharf was erected over a part of the river, between high and low-water mark, where boats were used before to pass. For the defendant it was shown, that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unload at the wharf, which, before the building of the wharf, anchored in the middle of the river;

¹ *Rex v. Russell*, 4 Adol. & Ell. R. 384.

² *Rex v. Tindall*, 6 Adol. & Ell. R. 143.

and the channel of the river was by this convenience kept clear. It was held, that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erecting of the wharf had caused a benefit to the navigation in general.¹

The defendants were indicted for a nuisance, in erecting a wharf on the river Thames, to the injury of the navigation of the river. The corporation of London were conservators of the river, and had let a space of ground to Lord Grosvenor, one of the defendants, upon certain considerations; amongst others, for a fine of £400, for the purpose of erecting a wharf there. It had been made between high and low-water mark, and extended for a considerable space along the river. There had formerly been a recess there, between two projections. It was shown, on the part of the prosecution, that the recess had, in a former state of the river, afforded a place of refuge in stormy weather, and that the eddy water which it produced had been very convenient for the passage of watermen. The defendants contended, that the corporation had a right to make the erection in question, being conservators of the river, and that they had a power by statute (14 Geo. III.) to build and let wharves, provided they did not interfere

¹ *Regina v. Randall*, 1 Car. & M. R. 496.

with the navigation of the river. But C. Justice Abbott inquired, whether it was meant to be contended, that the defendants had a right to narrow the Thames, so long as they left a space sufficient for the purposes of navigation. The learned judge said, that the defendants could derive no protection from the corporation; for although they might have a right to the soil, they had no power to take a fine legally from any one who might make an erection for the benefit of the public. And if the erection were a nuisance, no protection could be conferred by a body which received a pecuniary remuneration for permitting the erection. The defendants, upon this, proceeded to give evidence that the erection of the wharf had been an advantage instead of a nuisance; that the recess itself had been formerly a nuisance; and that the acts which had been done were beneficial generally to the stream. In summing up to the jury, the C. J. observed, that in order to be exonerated from responsibility, it is incumbent on a party who meditates an alteration in the highway, or other subject-matter of public right, to proceed by inquiry before the sheriff. If there be a neglect in so doing, it lies on the party to show that his change has not been detrimental to the public. Now, the question at issue was, whether the public convenience had been affected or diminished by this alteration. The public had a right to all the convenience of the former state of the river, unless some degree of ben-

efit were offered by the change. It had been said, that the benefits enjoyed before the erection of the wharf had been limited to particular times and seasons of the weather ; but yet the public ought not to be deprived of these, for the sake of an erection which was a matter of private convenience. The jury acquitted Lord Grosvenor, but found the other defendant guilty.¹

In a case in the municipal court of the city of Boston, in the year 1829 (*Commonwealth v. Wright, et al.*²), an indictment was found by the grand jury, which was a charge against the defendants for a common nuisance in building a wharf of one hundred feet in length into the channel of the south harbor of the port of Boston. Judge Thatcher, before whom the cause was tried, in committing the case to the jury, thus stated the general principles of law which he conceived applied to the case : “ Our ancestors brought to this country the common law of England, which they claimed as their right and inheritance, and it has continued to be a part of our law to the present time, so far as it was applicable to our situation, and where it has not been altered or repealed

¹ *Rex v. Lord Grosvenor et al.* 2 Stark. R. 511. And see *Folkes v. Chad*, 3 Doug. R. 340.

² *Commonwealth v. Wright et al.*, reported in the *American Jurist* for April, 1829, as a case which had excited much public interest, on account of its involving a question of general and practical importance in all parts of the country situated on the seashore and navigable streams. 3 Am. Jurist, 185.

by the constitution of the commonwealth, or by acts of the legislature.

“By that law, the sovereign is the owner of the shore, as it is called, which is the ‘ground that is between the ordinary high-water mark and low-water mark,’ as well in ‘the shore of the sea as in the shore of the arms of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows.’ Hale’s *Treatise De Jure Maris*, c. 2, p. 12, in Hargrave’s Tracts.

“When it is said, that the sovereign is the owner of the seashore, it is meant, that the legal title is in him, not for his exclusive use and profit, but in trust for the common benefit of all his subjects. It is therefore his duty, as well as his right, to keep the seashore free from encroachment, and not to suffer any individual, on his mere authority, to intrude on it.

“But sometimes the common good of all the subjects requires that bridges should be erected across the channel of a sea or river, and that wharves and other commercial accommodations should be projected beyond the line of high-water mark, and even into the channel; and therefore the law leaves it to the wisdom of the sovereign, and makes it his right and duty to have these constructed.

“What in England belongs to the king, in our more free and equal system belongs to the people, whose will is expressed, and whose rights are represented by the legislature.

“One of the earliest acts of the colonial government was to grant to the proprietors of the soil ‘adjoining to creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the right of propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further.’ This was about the year 1641.

“If a citizen, of his own authority, and without the consent of the legislature, and after so liberal a grant, shall infringe upon the right of all the other citizens, by extending his wharf beyond the line of low water, and into the channel, to the common detriment, it is his own presumption; and if the commonwealth, in the exercise of its trust, shall eject the intruder, and cause the nuisance to be abated; he must recollect that he has offended against a principle of law, which is as ancient as it is reasonable, and as well known as any other principle in our code.

“But it does not necessarily follow, because the defendants have extended their wharf beyond the line of low water and into the channel, that it is a common nuisance, and that it must be abated. Where it is shown that a person has intruded upon a highway which is common to all the citizens, and has appropriated it to himself exclusively, the *presumption* is, that it is a detriment to the public; because it is a diminution of their privilege in the enjoyment of a common right.

"But the presumption in such case may be repelled, on the part of the citizen, by showing, that so far from having created a detriment to the public, by extending his wharf into the channel, or by the structure which he has placed on the highway, he has thereby in truth increased their accommodation, and not diminished it; and therefore that he is not liable to be convicted of a nuisance, nor ought the wharf or other structure to be removed.

"It is true, he may say, that this has been placed on the highway, and I know that any citizen may use it. I can neither prevent him from the use, nor compel him to pay me for the enjoyment. The government may also, by its officer, enter upon it, and eject me from the possession. But what I have done is not a public evil, but a public good.

"The law is so; but then, as it is most reasonable, so I conceive it to be incumbent upon *him* to show this fact in his defence."¹ * * *

¹ The learned judge said he knew this was the course pursued in the trial of the case of the indictment against John May, in the supreme judicial court, Suffolk, March, 1803, for a nuisance in extending Union wharf, at the northeast part of Boston, into the channel. The report of the case, as taken from the minutes of Judge Thacher, the judge of the municipal court of Boston (and not the judge of the same name, who was one of the judges of the supreme court in 1803,) is contained in 3 Am. Jurist 190 *et. seq.* "Commonwealth v. John May. Indictment for nuisance for erecting a wharf in the highway of the harbor of Boston. The subject of complaint was the erecting an addition to Union wharf, at the north end of the town. On motion of Mr. Otis, the jury went to the spot to view the wharf.

“It is the right and duty of the government, to preserve the highways from obstruction both by

The solicitor-general stated the general doctrine of nuisances, and quoted the law of the old colony of Massachusetts, passed in 1641, which provides ‘that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further.’ The erection complained of in the indictment, was shown to be beyond low-water mark, and the fact of erecting was admitted by the defendant. The solicitor-general said that he conceived he had then done all that was necessary to support the charge. Mr. *Amory*, in defence. To support the charge, the government ought to show something more, than that the wharf was erected on a spot belonging to the public. It ought further to appear, that it is a detriment to the public. He then offered to show by evidence that the wharf was a public benefit. *Parsons* objected to such evidence. The defendant having admitted, that the wharf is on the highway, it cannot be a question of fact, whether it is a nuisance. A tavern might be placed on the highway. It might be a convenience to travellers, but the court would not go into such evidence. *Otis*.—If that doctrine is true, then almost every wharf in Boston harbor is a nuisance, and must be demolished. No prescription can be pleaded in favor of a nuisance, for the government cannot authorize one. A harbor supposes something natural and something artificial. Vessels have access to it from the sea, they may enter, tarry, and depart. They may likewise load and unload their cargoes, to do which there must be wharves, extending into water of depth sufficient to accommodate vessels of heavy burthen. A highway in a harbor is something different from one on land. If trees are planted, or a horse-block placed on the latter, it would be for the jury to decide, whether such would be a nuisance, which is a common detriment. A ditch being dug in a highway, if it could be shown to be an amelioration of the road, would be considered as part of the highway, and not a nuisance. Nuisance or not is always a question for the jury. *Parsons*.—If one man may extend his wharf beyond low-water mark, he may carry it to the channel, and thus materially lessen the value of other wharves. If each is restrained within

land and water ; since both are of the highest moment, the one for the navigation of boats and vessels, the other for land carriage.

such limits as the law prescribes, the principle of equality is preserved. No inconvenience will follow. Should any arise, the legislature have power to provide a remedy. The legislature cannot, it is true, authorize a nuisance, but when a wharf is extended, by leave of the government, beyond low-water mark, that could not be a nuisance. The continuance of a nuisance for sixty years would in such case be a good plea against government, and for forty years against an individual. Mr. Parsons mentioned a case decided lately at Salem. Capt. Crowninshield was indicted for a nuisance in erecting a certain wharf in that place. The building was *on his own land* and *within* low-water mark. But it was shown at the trial, that it annoyed a Mr. Ward in the use of his wharf, so that vessels could not approach it. It was declared to be a nuisance on the principle, that a man shall use his own so as not to injure another. The jury found him guilty, and that the nuisance consisted of a certain number of feet, which were accordingly demolished. Strong, Sedgwick, and Thatcher, were for the admission of the evidence. But Paine and Sewall not. *Sewall.*—The defendant is charged with having done something *in evil example to others*. This wharf is confessed to be on the highway. If others should do likewise, it would be a common detriment. Several witnesses then testified, that they considered the wharf as a public benefit, in that it accommodated vessels of heavier burthen than could lay at any other wharf in the harbor. After argument, the court permitted the question, whether the wharf was not an impediment and injury to the wharf of Ebenezer Parsons, the prosecutor. The witnesses said, that it was a detriment, but it did not essentially lessen the value of that property. The case was argued at great length by Otis and Parsons. The defendant admitted that the wharf was a *purpresture*, or an encroachment on public property, for which an information might be brought, or a writ of intrusion. But admitting it to be an injury to Parsons's wharf, he would have his remedy in a civil action. The great question on which the opinion of the court was divided, was, whether since the soil was admitted to be in the public, the wharf was not of course a nuisance. Before the wharf was erected, every citizen coming to the port, had a

“The port or harbor is free for all, whether citizens or strangers, to navigate, and ought to be preserved from impediments and nuisances, which would hinder and annoy the access, stay, or departure of vessels.

“It is not necessary to dilate on the importance of a harbor to a place, whose inhabitants are dependent on commerce for their subsistence. Destroy the harbor, and you will soon make the city desolate. Indeed, so careful is the law of the freedom and security of the highway, both on land and water, that any person may, upon his own authority, lawfully remove by force a common nuisance. ‘Any man,’ says Lord Hale, ‘may justify the removal of a

right to cross and recross this spot, and to moor his vessel there. This right belonged to the public, and no individual had authority to interrupt the public in the enjoyment of this right, much more to monopolize it. The public are the judge of their own advantages. Had Colonel May erected the wharf and given it to the public without claiming wharfage or dockage, it might have been a question, whether it was a nuisance. 2 Coke, Inst. 272. One man may not appropriate a public benefit to his sole and exclusive use. On pretence that a highway is crooked, he may not enclose part, and, upon opening into it part of his own field, exact a toll of travellers, on pretence that he had rendered the highway better. Judges Strong, Sedgwick, and Thatcher, thought that it was competent for the jury to inquire, whether the erection, stated in the indictment, was a public benefit. If they should be of that opinion, they could not find the defendant guilty. Judges Paine and Sewall said, that it was sufficient, in their opinion, to authorize the jury to find the defendant guilty, that the wharf was erected on the public soil. The jury found the defendant *not* guilty. The trial occupied three days, and excited much interest.

common nuisance, either on land or water, because every man is concerned in it.' The public may not be subjected to the inconvenience and delay of a long litigation; for the law in this matter departs from its usual severity, which forbids resorting to violence in most cases of civil wrong. For suppose a man should place his cart in the middle of State street; or should, upon his own claim of right, throw a bridge across the channel from the Union wharf to Chelsea, and so destroy the highway for the purpose of the passage of vessels to Charlestown, and to the western and northern parts of this city; it would not, I think, be tolerated for a day. But those, who by force remove a nuisance, act upon their own responsibility; and no one should resort to this forcible mode of redressing a nuisance, but where the right is clear and the necessity is urgent. 'Because,' says Lord Hale, 'this many times occasions tumults and disorders; the best way to reform public nuisances is by the ordinary courts of justice.' Hale's *Treatise De Jure Maris*, p. 87.

"The object of the present indictment is to preserve the safety of the harbor of Boston, and to protect the public in the full enjoyment of what they are by law and of common right entitled to, *a free and unobstructed navigation*; and if you should finally decide, that the defendants are guilty, you must further say, what part of the wharf is to be considered as a nuisance, that the court may know what judgment to render on the verdict.

“1. It seems not to have been contested by the learned counsel for the defendants, that the wharf is erected on the channel of the harbor; which is, and ever has been, from the settlement of the country, common to ships, vessels, and boats of all sizes, to enter, remain, and leave at pleasure, whether belonging to citizens or strangers.

“It is this right of common use which constitutes it a highway. ‘As the common highways on the land are for the common land passage, so rivers, whether fresh or salt, that are for common passage, and ports and harbors, are highways by water.’

“2. The defendants have not denied, by their counsel, that they caused this wharf to be erected; not under the authority of an act of the legislature, nor even with the consent and approbation of the city, but on their own claim of right.

“They are in possession of the upland under a claim of ‘propriety.’ Whether their title to these flats is absolute and under a legal title, need not give to you any trouble to settle. The title is not in issue. No one claims it against them; no better title is shown; and they are, at any rate, answerable for the nuisance, if you shall find it to be one. I have not been able to see, that the goodness of their title to the flats and upland, is a material point to be settled in this cause.

“3. On the part of the commonwealth, it was first proved by the testimony of S. P. Fuller, the

surveyor, that the defendants have extended this wharf to the distance of one hundred and forty-two feet below the line of low water into the channel, which is, at this place, three hundred and fifty feet wide. Here the counsel for the government rested their case in the first instance. If nothing more had been shown on either side, it would have been for you to say, whether such an encroachment on the public highway without necessity, or justification, or proof of benefit to the public, was not a common nuisance. I should have felt bound to instruct you, that it was an encroachment on the public convenience, and that in the absence of all proof, on the part of the defendants, tending to show, that the wharf was a benefit to the channel, you would be bound to find them guilty.

“The case would have been different, if the commonwealth had complained of a wharf, erected within or above the line of low water. This would have been within the legal right of the defendants; and the presumption would therefore have been, that it was no more than they might lawfully do; and until it had been shown by evidence, that it was, in fact, a nuisance, the defendants could not have been required to justify or excuse the act.

“The defendants have gone into the examination of many witnesses, and from the testimony they argue, that this wharf is a common benefit to the citizens for various reasons, viz :—

"1. Because, they say, it furnishes a safe and efficient guide to those who navigate that channel, being built on a line with the current, and so facilitating the passing of vessels.

"2. It furnishes a facility for those vessels which intend to pass through the draw of the free bridge ; because by running a warp from the vessel to the wharf, it can get along with more safety and ease than in any other way.

"3. It will save time, in moderate weather, to make vessels fast to this wharf, instead of dropping an anchor, which they would otherwise be obliged to do.

"4. In returning through the draw from the more southerly wharves, vessels are furnished with a great convenience by running a line to this wharf, so as not to come to anchor, or stand in the way of other vessels following them through the draw.

"5. It is a convenience for vessels to lie at this wharf waiting for a wind, rather than to attach themselves to the buoy, where they are apt to run foul of each other.

"6. This wharf protects vessels lying at it in a northeast storm, and furnishes a necessary protection to the bridge.

"The counsel for the defendants insisted, that the wharf did not narrow the channel so much as was pretended ; or divert the channel into a new direction. And he ingeniously argued, that if the

wharf was away, a succession of buoys would be required to direct the passing of vessels; and that the space was not wanted for vessels, as the water was not of sufficient depth to permit them to pass over it, or to come to anchor.

“But on the other hand, Mr. Shaw, in his closing argument, for the prosecution, after displaying the importance of the harbor and navigation to the prosperity of the city, how much it depended on the coasting trade, and how necessary it was to keep this channel free for the passing of vessels to and from the wharves at the south of the city, insisted that this wharf is an encroachment on the public highway, and that, by law, the defendants were bound to show that it did not injure any one, and that it was a decided benefit to the navigation.

“It is undoubtedly true, as the learned counsel has urged, that to straiten a public highway is always an inconvenience, and that you are bound not to allow it on possible grounds of speculative advantage. It is for you, however, to determine, whether the whole space, which nature has assigned to the channel in this quarter, is not wanted for vessels to come to and lay at anchor.

“It is contended by the counsel, that it has been made clear by the testimony of the witnesses, that the depth of water is lessening in our harbor, and that every new wharf has a tendency to increase that effect. And further, that the erecting of this

wharf has caused a prejudice to the channel, by giving a new and more southern direction to the current.

“He has argued, that although it may be convenient, in some cases, for vessels passing this wharf, to make use of it, for towing and warping by it, so as to approach the draw of the bridge in that way; yet, that no such right as that of *towing* exists; and that the defendants may exclude individuals from making that use of it.

“I am of the opinion, as to this point, that if an individual erects a wharf upon the highway, he cannot exclude any of the citizens from going upon it, and using it, as if it were in its natural state. The improvements made upon it by individuals, do not change it from public to private property. But I do not consider, that the citizens may freely, and without the consent of the proprietor, enter upon a wharf which is erected within the line of low water, for the purpose of towing their vessels, or for any other. In such case, the proprietor would have a right to insist on compensation for the use made of his estate; but one, who has intruded upon the public highway, may not only not claim any compensation for such use made of his improvement, but any citizen may rightfully abate the encroachment, and the officer of the government may enter upon it, and reinstate the public in its rights.]

“That you may settle the facts in this case with

intelligence, you must examine impartially the testimony of the witnesses on both sides. They are numerous, thirty-five having been examined for the defendants, and thirteen for the commonwealth. It is your peculiar province to decide, whether they were honest, intelligent and independent witnesses; to compare the degree of knowledge which they severally possess; and to ascertain whether it was the fruit of experience and observation, or derived from the information of others.

“The witnesses, on both sides, consist of masters of coasting vessels and lightermen, who have navigated this channel, and of experienced navigators and pilots, and of other citizens, who have done business in the vicinity of the wharf, or whose course of duty has called them frequently to that quarter. Most of them are acquainted with the harbor, and qualified to form a judicious opinion of the effect of this wharf upon the southern channel.

“Here the judge, after referring to the length of time which the trial had occupied and to the several adjournments which had occurred, read the testimony of each of the witnesses from his minutes, the counsel on both sides comparing it with their own.

“Now it may undoubtedly be true, that this wharf may occasionally have been useful to vessels passing through the channel in that quarter, and yet, if all the purposes for navigating vessels there, can be effected by a buoy, which is moveable, and

causes no obstruction, then the necessity for this permanent wharf thrown into the channel is removed, and it will cease to be a benefit.

“ If the effect of building a wharf into the channel will be, in the course of time, to injure and destroy the channel here, by lessening the depth of the water, or by giving a new and injurious course to the current ; and if such injurious effects will in your opinion exceed the benefit to navigation, you must, in that case, declare it to be a common nuisance.

“ If the defendants have left it doubtful in your minds, whether this structure is a decided benefit to the navigation, they have failed in their defence.

“ Finally, you are witnesses sworn to decide what you believe to be true from all the testimony ; and you are to apply to the case a sound and impartial judgment, not failing to exercise that common sense, which is the effect of your own experience in such matters, and without which the deepest research into books will fail of the truth. But as it is not to be expected, that in a case of so much interest, and which has led into such a field both of fact and argument, difference of opinion may not exist ; you will permit me to add, that as you have exercised so much patience towards the parties, it is most reasonable that you should, in your deliberations, exercise like patience towards each other ; and so, I doubt not, you will come to a united and just result.

“ *Verdict.* The jury find the defendants guilty,

and declare so much of said wharf a nuisance as is contained in a triangular piece marked upon the plan, beginning at the southeast angle, and running fifty feet westerly, and from thence to the northeast angle, of said wharf; and not guilty as to the residue.

" Municipal Court, February Term, 1830.

" Wednesday, February 10th. The defendants appeared in court, on this day, by order, and expressed their readiness to submit to the sentence of the court, without appealing from the judgment to the supreme judicial court, as by law they might. The judge informed them, that it must be part of the judgment, that the nuisance should be ordered to be abated at their expense. They then stated, that it would be attended with great difficulty and expense to remove the wharf. It was built on piers driven into the bottom of the channel, all of which must be drawn up, both for the safety of the channel, and for the good of that portion of the wharf, which would remain. They further said, that it had not appeared in the course of the trial, that any objection was made while the wharf was building, either on the part of the city, or of the commonwealth, to the same; and they denied, that any objection had been made to it by any one else. In consideration of their readiness not further to contend in law, they prayed that the court would not subject them to a fine, which would be oppressive in its amount.

“The judge said, that from the information which he had received, he was satisfied, that it would be a difficult and expensive operation, to draw up the piers and piles, and that it would require much time. He presumed it would cost several hundred dollars. It was not usual in these cases, to assess a severe fine, in nature of a vindictive punishment, where the parties submitted to the judgment, and were willing that the nuisance should be abated. He should therefore assess a nominal fine only, and a warrant would be issued to the sheriff of the county to cause the nuisance to be removed; but as this could not be done advantageously till the warm season, the warrant would be made returnable on the first of July next.

“The following judgment was then entered.

“Whereupon it is considered by the court that they, the said William Wright and Abraham A. Dame, do, for the offence of which they have been convicted, severally pay a fine of twenty dollars, to the use of the commonwealth, to be disposed of according to law; that they pay the costs of this prosecution, taxed at seventy-six dollars and eighty-four cents, and stand committed, until they shall comply with this sentence.

“And it is further ordered by the court, that so much of the said wharf, as is found in and by the verdict of the jury to be a nuisance, with all the piers and timbers under, and the materials belonging

to the same, be dug up, demolished and abated, at the expense of them the said William Wright and Abraham A. Dame; and that a warrant issue to the sheriff of the county of Suffolk, to cause the said wharf, with all the piers and timbers, and materials, under and belonging to the same, forthwith to be dug up, demolished, and abated; and to levy the expenses thereof upon the money, goods, chattels or estates of the said William W Wright and Abraham A. Dame, of them or of either of them; and for want thereof, upon their several bodies; all which is according to law.' "

In the court of oyer and terminer at Philadelphia, in the year 1783, there was an indictment for a nuisance in erecting a wharf upon the public property. The defendant offered witnesses to prove, that the erection of the wharf had been beneficial to the public, and therefore was not to be considered a nuisance. The court held this to be no justification.¹ In the year 1796, an individual was charged with obstructing, by a wharf, a navigable river, and it appeared, that a part of the wharf was *below* low-water mark. He contended, that although his wharf extended thus far, it was no obstruction to the navigation, and no injury to the public; and that, as the channel alleged to be obstructed, only led into a small dock, enclosed with wharves of private persons,

¹ *Respublica v. Caldwell*, 1 Dallas, R. 150.

the injury complained of, if any, could only be the ground of a civil action. The court held, that it was no obstruction, provided a sufficient passage-way was left for the public. The jury had a view, and being satisfied that there was not a sufficient passage-way left for the public, their verdict was against the defendant as to a small part of the wharf which was in the channel.¹

Though by the colonial ordinance of Massachusetts of 1641,² a riparian proprietor holds the low-water mark, to the distance of one hundred rods from high-water mark, the right given was a qualified right to use the interest granted in such a manner as not to interrupt the rights of the public as secured by the ordinance; and the right of navigation was expressly reserved by the ordinance.³ The erection of a wharf *below* low-water mark, without authority from the legislature, gives the builder no possession, and no color of title beyond the limits of the land under water actually covered by the wharf, and does not draw after it any exclusive right to the use of the open space by the side of it, for the purposes of a dock, by way of easement as appurtenant to the wharf. Such open space, below low-water mark, being a public domain, the use of

¹ Commonwealth v. Crowninshield, contained in 2 Dane's Abr. 697.

² Anc. Chart. 148.

³ Parker v. Cutler, Milldam Corp. 2 App. (Me.) R. 357.

it by the builder of the wharf for the purposes of a dock, with the acquiescence of any individual, does not establish an easement as against such individual.¹

The first settlements in this country were on harbors or arms of the sea, and commerce being among the earliest objects of the attention of the first emigrants, wharves for the purposes of that pursuit were necessary. Accordingly, as the colony of Massachusetts was not able to erect them at the public expense, in order to induce individuals to do so, the common law of England was altered by the ordinance of 1641 above mentioned, providing, that the proprietor adjoining on the sea or salt water, shall hold to low-water mark, where the tide does not ebb more than *one hundred rods* from high-water mark, but not more where the tide ebbs to a greater distance.² Although this ordinance was annulled with the charter by the authority of which it was made, yet from that time to the present an *usage* has prevailed, which now has the force of a local common law, that the owner of land bounded on the sea or salt water shall hold to low-water mark as provided by the terms of the ordinance.³ This usage applies to the shores of the sea, as well as to "creeks and

¹ *Gray v. Bartlett*, 20 Pick. (Mass.) R. 186.

² *Storer v. Freeman*, 6 Mass. R. 435.

³ *lb. and Sale v. Pratt*, 19 Pick. (Mass.) R. 191.

coves;" and it has ever been held, that although the public have a right to pass and repass on the waters, so long as the owner of the adjoining land suffers them to remain open and unobstructed, yet the owner of the adjoining land may, whenever he pleases, enclose, build and obstruct to low-water mark, and exclude all mankind.¹ The ordinance never extended to the colony of Plymouth, as positive law, but it is nevertheless a settled rule of property throughout the state of Massachusetts. A usage for two centuries, uniform and unbroken, must be taken as sufficient evidence, it has been held, that the terms of the ordinance of 1641 was adopted by those who had the right and power of establishing it, in such form as to give it the force and effect of a rule of law. The ordinance has been recognized both in Plymouth colony and in Maine, not as a point adjudicated, because never called in question, but because it has been assumed and acted upon as a settled rule.²

Under this ordinance and usage, it is "the ebb of the tide, when, from natural causes, it ebbs the lowest, and not the average or common tide, which

¹ *Austin v. Carter*, 1 Mass. R. 231; *Commonwealth v. Charlestown*, 1 Pick. (Mass.) 180; *Barker v. Bates*, 19 Ib. 255.

² *Storer v. Freeman*, 6 Mass. R. 435; *Parker v. Smith*, 17 Ib. 413; *Barker v. Bates*, 13 Pick. (Mass.) R. 255; *Mayhew v. Norton*, 17 Ib. 357; *Lapish v. Bangor Bank*, 8 Greenl. (Me.) R. 85; *Emerson v. Taylor*, 9 Ib. 43; *Moore v. Griffin*, 9 Shep. (Me.) R. 350.

is to be taken as low-water mark."¹ If the tide does not ebb entirely from a creek, it is a boundary beyond which the owner of the flats, as the riparian owner, cannot recover.² The flats will pass agreeably to the terms of the ordinance by a conveyance of a wharf and its appurtenances;³ and if in a deed of conveyance of the upland, it be bounded by a "harbor" (as "the harbor of Edgartown") that phrase is necessarily as extensive as if the grantor had bounded by the sea, or salt water, or low-water mark, for the harbor includes not only the land covered by the sea below low-water mark, but also the land or flats where the tide ebbs and flows between high-water mark and low-water mark.⁴ A proprietary grant in 1680 of "a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width," was construed to extend to low-water mark.⁵ The settlers of land in Bangor, who, by a resolve of 1801, were to be quieted in their possessions of a hundred acres each, whose lands adjoined the river, are entitled to the flats lying in front of their respective lots, notwithstanding the full complement of a hundred acres

¹ *Sparhawk v. Bullard*, 1 Met. (Mass.) R. 95; and see *Storer v. Freeman*, *sup.*

² *Sparhawk, &c. sup.*

³ *Doane v. Broad Street Association*, 6 Mass. R. 332; *Sparhawk, &c. sup.*; *Ashby v. Eastern R. Ro. Co.* 5 Met. (Mass.) R. 368.

⁴ *Mayhew v. Norton*, 17 Pick. (Mass.) R. 355.

⁵ *Adams v. Frothingham*, 3 Mass. R. 352.

each was laid out to them upon the upland.¹ Where a lost deed of upland is presumed, from long continued possession, it will carry the flats as appurtenant, without proof of actual possession, unless there is evidence showing a separation of the title to the two.² If a demandant, in a writ of entry to recover flats, shows, that he, or those under whom he claims, had an actual seisin or possession prior to the tenant's entry, he is entitled to recover, although he may have no other title to the land than such possession, unless the tenant shows a better title in himself, or in those under whom he claims.³ But, if the owner of a parcel of flats covers the whole of the same, to low-water mark, with a wharf, he does not thereby assert the claim of a right to lay vessels upon the flats of an adjoining proprietor; and therefore the silence of such proprietor, during the erection of the wharf, is no evidence of his tacit acquiescence in such a claim.⁴ An ancient location of flats adjacent to the flats demanded, by description in a deed between third persons, though unaccompanied by an open and notorious possession, will govern the line of the demanded premises, unless the party objecting can prove that the line ought to have been laid out in a different direction.⁵

¹ *Lapish v. Bangor Bank*, 8 Greenl. (Me.) R. 85.

² *Valentine v. Piper*, 22 Pick. (Mass.) R. 85.

³ *Sparhawk v. Bullard*, 1 Met. (Mass.) R. 95.

⁴ *Gray v. Bartlett*, 20 Pick. (Mass.) R. 186.

⁵ *Sparhawk, &c. sup.*

By a grant of a parcel of land which is covered by the sea at high water, nothing passes, under the colonial act of 1641, except what is comprehended by the terms of the deed. Thus, where the plaintiff claimed under a right originally from the town, of a *thatch* bank, and it was found, that the *locus in quo* was a gully covered by the sea when the tide was up, where no *thatch* could grow; it was held, that this gully did not pass by the deed or vote of the town, for nothing more would pass than would justify the terms; and the object was to enable the plaintiff to cut *thatch*. Nor was it a grant of the upland which would carry with it the flats to the channel.¹ Flats and upland may be separated by an alienation of one without the other; and though ordinarily proof of title in the upland bounding upon tide water, carries with it, under the ordinance, evidence of title in the flats, yet a man may sell his flats without the upland, or *vice versa*, if he pleases;² as where land is granted as bounded on a *way*, which way adjoins the seashore, the ordinance and the usage do not apply.³ In *Storer v. Freeman*,⁴ the question arose upon the construction of two deeds, whether the flats did or did not pass by the grant,

¹ *Lufkin v. Haskell*, 3 Pick. (Mass.) R. 359.

² *Valentine v. Piper*, 22 Pick. (Mass.) R. 85; *Mayhew v. Norton*, 17 Ib. 357; *Brown v. Lakeman*, 15 Ib. 157.

³ *Codman v. Winslow*, 10 Mass. R. 146.

⁴ *Storer v. Freeman*, 6 Mass. R. 535.

and by Parsons, C. J., who delivered the opinion of the court: "As it appears that the shore mentioned in the first deed is not covered with rock, but forms a beach or flats, we shall for *shore* substitute *flats*. The land described will then extend to the flats, and be bounded by the flats. On this substitution, the construction is manifest. The land conveyed extends *to* the flats, but not *over* them: and the flats being a bound of the land conveyed, are not a part of it. Thus by a strict and technical construction of the description of the land conveyed, we are satisfied that no part of the flats passed by the first deed.

"The description in the second deed varies in one respect from the description in the former deed. In the first deed, the course runs to the shore, and thence by the shore. In the second deed, let us substitute flats for shore, and the course will run to a heap of stones by the flats at *Elwell's corner*, and thence by the flats to the land described in the first deed. *Elwell's corner* not being located by any evidence or admission, we cannot presume that the first course extended over the flats to that corner; for, especially when, being satisfied that by the technical construction of the first deed the flats were not conveyed, we observe that the boundary line from *Elwell's corner* runs by the flats to land which passed by that deed. For we cannot presume that this boundary line crossed the flats in its course. Adhering

therefore to a technical construction of the two deeds, unassisted by any parole testimony to explain latent ambiguities, we are satisfied that the plaintiff has no title to the flats, derived under the two deeds, or under either of them." So it is where the grantee is bounded by "high-water mark ;" he is not riparian proprietor, and therefore not entitled to the benefit of the ordinance of 1641 ; that is, his grant does not entitle him to the flats below "high-water mark."¹ But it is otherwise where the grantee is bounded by the "stream,"² or "on the sea or salt water,"³ in both which cases, the flats adjoining the upland conveyed, are included. In the case of a grant of land, with the flats belonging thereto, the tenant may show what flats belonged to the land, or that the demanded premises were not included in the grant.⁴ In an action to recover a parcel of flats to the south of Summer street, in Boston, it appeared that the land on the north, and that on the south side of the street, originally constituted one line of shore, and the several proprietors of the upland were coterminous proprietors of the flats ; and there was evidence tending to show that some wharves had been erected in the first century

¹ *Lapish v. Bangor Bank*, 8 Greenl. (Me.) R. 85 ; *Dunlap v. Stetson*, 4 Mason (Cir. Co.) R. 349.

² *Lapish, &c. sup.*

³ *Green v. Chelsea*, 24 Pick. (Mass.) R. 71.

⁴ *Sparhawk v. Bullard*, 1 Met. (Mass.) R. 95.

of the settlement of the town, in conformity to which the land and flats had ever since been held; and in reference to this evidence, the jury were instructed, that if they should be satisfied that Summer street (which was laid out in 1683) was laid out over the flats, in conformity with the lines of the lots and of the wharves to the northward of that street, it would be evidence to show that the flats to the southward of the street were to be divided by the same course or system. This instruction, it was held, was correct.¹

A riparian proprietor on a cove, where the sea ebbs and flows, who is entitled, under the colony ordinance of 1641, to the adjoining flats, cannot always claim the flats in the direction of the *exterior* lines of his upland, but only in the direction towards low-water mark from the two corners of his upland at high-water mark. Thus, in the case of a circular cove, in which there is no natural channel, if a straight line across the mouth of the cove is *one* hundred rods in length, and the circular line of high-water mark is *two* hundred, each owner of a lot abutting on the cove is entitled to run his lines from the two corners of his lot in a direction towards low-water mark, so as to include a parcel of flats, which, at the mouth of the cove, will be one half the width of the lot at high-water mark; and thus each will hold his share in severalty. In this manner, by con-

¹ *Valentine v. Piper, sup.*

verging lines, the whole cove may be divided without any intersecting lines. Dividing flats in a cove or creek in this manner, it is supposed that there is no natural channel within the cove, and that low-water mark is without the same.¹ Flats were divided among coterminous proprietors, according to this rule, in the case of *Sparhawk v. Bullard*.² The mode of ascertaining the side lines of water lots, from the upland to low-water mark, it has been held in Maine, is, to draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water mark. If the line of the shore is straight, the side lines of the lots, thus drawn to low-water mark, will be identical; but if by reason of the curvature of the shore, they either diverge from, or conflict with, each other, the land enclosed by both lines, or excluded, as the case may be, is to be equally divided between the adjoining proprietors. The expression to "the low-water mark," seems evidently to imply to the low-water mark in the nearest direction, and without any regard to the course of the side lines of the upland to which the flats are adjoining and appurtenant.³

¹ *Rust v. Boston Mill Corporation*, 6 Pick. (Mass.) R. 158.

² *Sparhawk v. Bullard*, 1 Met. (Mass.) R. 95. Analogous to this rule is the division of *alluvial* increase. *Deerfield v. Arms*, 17 Pick. (Mass.) R. 41; and see *post*, Ch. VIII. on Marine Increases.

³ *Emerson v. Taylor*, 9 Greenl (Me.) R. 42.

The foregoing cases in Massachusetts and Maine, which have been cited in relation to the right of riparian proprietors to extend wharves in front of their lands, clearly sustain the principle, that such right may be acquired by the local law of *usage*, or *custom*. In the year 1790, in the case of the Commonwealth *v. Pierce*,¹ it appeared, that there was a small tide river in Salem, in Massachusetts, and that the defendant had continued out his wharf to the channel or near it, which was at a considerable distance from high-water mark, and quite up the river towards the head of navigation. It was adjudged, "that wharves were useful and necessary to trade, and might by the *common practice* of the country, be built out to low-water mark, or *further*, if not injurious to the public interest." It is probable, says C. J. Parker, the usages of our country have given a reasonable limitation of the doctrine of the common law, confirming the public right to what may be of public use; "so that," he adds, "in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained."² It was stated at the bar in *Martin v. Waddell*,³ that the right of a riparian proprietor to "wharf out" into a public river, is a local custom in New Jersey. In Connecticut it has been expressly

¹ Commonwealth *v. Pierce*, cited in 2 Dane's Abr. 696.

² Commonwealth *v. Charlestown*, 1 Pick. (Mass.) R. 180.

³ *Martin v. Waddell*, App. p. lxi.

adjudged, that such a right is thus derived in that state, and that the riparian proprietor has the exclusive right of soil to low-water mark.¹ In giving the opinion of the court in *Chapman v. Kimball* in Connecticut,² Daggett, J. says, — “The adjoining proprietors have the right to the shore, subject to the paramount right of the public. The usage of the owners of the land to high-water mark to wharf out against their own land has never been disputed. The interests of navigation have been observed; and the consequences have been altogether salutary. On the death of the owner to high-water mark, his estate in the shore and the erections upon it, has descended to his heirs. This is our common law, founded on immemorial usage.” It has often been decided in Pennsylvania, says Mr. J. Huston, in giving the opinion of the court in *Hart v. Hill*,³ that the owners of land own to low-water mark; though at high tide a vessel or raft may sail over it. The same learned judge, in delivering the opinion of the court in *Ball v. Slack*, (Philadelphia, April 29 1837), says, — “Our acts of assembly would seem to have recognized the right of the owner (of the adjacent land) to erect wharves down to low-water mark. The act of 7th February, 1818, is supposed

¹ *East Haven v. Hemingway*, 7 Conn. R. 186.

² *Chapman v. Kimball*, 9 Conn. R.

³ *Hart v. Hill*, 1 Whart. (Penn.) R. 131, 137.

to have limited this, and to have required the sanction of the wardens even for this. I do not consider it necessary to discuss this point; at all events, the person applying, must show a right to the place to the wardens; but their permission is not evidence that he has a valid right; they have no power to cite parties or try titles; but it shows that none could lawfully build a wharf, but he who had a right to the place where it is built.”¹

In Rhode Island, an opinion has long prevailed throughout the portion of the state contiguous to tide water, that the proprietor of an estate adjoining the salt water, might lawfully augment it, by embanking in and upon the water, so long as he did not encroach upon nor obstruct what is generally denominated the “channel;” or in other words, so long as he did no injury whatever to the public. Hence it is, that the custom has been general to make accessions to land in this manner, without any suspicion of the want of right and authority so to do, and consequently without obtaining any formal and

¹ *Ball v. Slack*, 2 Whart. (Penn.) R. 539. The question in this case was, whether the upland where the wharf in question was erected, was the property of the plaintiff. Where a running stream is called for, it is always understood in Pennsylvania, that the ownership extends to low-water mark, and so far as that has been held in that state, a traverse line has been held technically to pursue the meanders, so as to include the points that would otherwise be thrown out of it. *Killing-smith v. Ground*, 5 Whart. (Penn.) R. 459. And see *Commonwealth v. Shaw*, 14 S. & Rawle (Penn.) R. 13.

express sanction of the sovereign or legislative power. But among the facts in the early colonial history of Rhode Island which have never become generally known, is the passage of an act upon this very subject by the general assembly, and it does not appear to have ever been repealed. By an act of that body passed in the reign of queen Anne, at the May session, 1707, it was enacted, — “that each *town* in the colony now established, or that may hereafter be established, may be, and have hereby granted unto them full power and authority to settle such *coves, creeks, rivers, waters, banks* bordering upon the respective townships as they shall think fit, for the promoting their several towns and townships, by building houses and warehouses, *wharves*, laying out lots, or any other improvements, and as by the body of freeholders and freemen of each town shall see cause for, or the major part of them, for their most benefit, not prejudicing any particular person in their property, original grants or purchases upon any the aforesaid harbors, coves, creeks, &c.; which we doubt not but will much promote the interest of her majesty and the good of her good subjects in said colony; for the promoting of trade and navigation.”¹

In 1822, the general assembly of the state passed

¹ State Records. Not to be found in any printed edition of the Laws, and was furnished the author by the Hon. Judge Staples, one of the present judges of the supreme court. The modern mode of spelling has been adopted.

an act relative to the harbor and public waters of the town of Providence, by the *first* section of which it was enacted, that the said town should be authorized and empowered to prevent encroachments or obstructions in the harbor, in the *cove* above the bridge, and in the other public waters of said town; and to make such laws, rules and regulations, for the preservation of the harbor, *cove* and waters, from encroachments and obstructions, as the town from time to time should think proper. By section *second*, the proceedings of the town in defining the bounds of the harbor are ratified as follows: "That the proceedings of said town on the 13th and 24th days of July, and on the 29th day of August, 1815, relative to the defining and ascertaining the bounds of said harbor, be approved and established, and the boundaries and lines mentioned and described in the report of the committee be, and the same are hereby established; except only that the course from a stake at Simmons' wharf to the bluff near the southeast corner of John Corlis' farm, stated to be in said report, south, fifteen and an half degrees east, be corrected according to the plat made by the said committee, to the course of south, nine and an half degrees east." By the *third* section, — "If any person or persons shall encroach upon any part of the said harbor, as defined, ascertained and established in and by the next preceding section of this act, by erecting or placing therein any wharf, building, or other

fixed obstruction, or neglecting to keep in good repair any wharf or lot adjoining the harbor, for the preservation of the channel, he, she, or they so offending, shall forfeit and pay a sum not less than fifty, nor more than five hundred dollars, to be recovered by action of debt, before any court proper to try the same ; one half thereof to and for the use of the said town of Providence, and the other half thereof, to and for the use of the person or persons who shall sue for the same : and it shall moreover be lawful for the town council of said town, to cause such obstruction to be removed at the cost and charge of him, her or them, who shall have so erected or placed the same, or caused the same to be erected, or placed as aforesaid." By the *fourth* section, — "If any person or persons shall violate any of the laws, rules or regulations, that may be at any time made by said town of Providence, for the preservation of the channel, and for the prevention of any encroachments or obstructions in the harbor of said town, or the cove above the bridge, or in the other public waters thereof, other than of the kind mentioned and described in the next preceding section of this act, he, she or they, shall forfeit and pay a sum not less than two, nor more than twenty dollars for each offence, to be recovered by action of debt, before any justice or justices of the peace of the said town, one half thereof, to and for the use of the said town, and the other half thereof, to and

for the use of the person or persons, who shall sue for the same.”¹

The city of New York includes the whole of the rivers and harbors adjacent to the city to *actual* low-water mark on the opposite shores, as the same may be found, from time to time, by docks, wharves and other permanent erections; yet King’s county, of which the city of Brooklyn is part, includes all the wharves, docks, and other artificial erections on the East river opposite to New York, though west of the natural low-water mark, on the Nassau or Long Island shore. But although the jurisdiction of the city of New York does not extend so as to include such wharves, &c. on the Long Island side, yet it does extend over the ships and vessels floating on the water, though they may be fastened to such wharves, &c. In other words, although permanent erections, such as wharves, &c. may from time to time vary the jurisdiction of New York, yet it is not allowed, that the jurisdiction of Brooklyn is to be extended by means of a floating vessel in the river, although she may be fastened to the dock.² This shows an admitted right of riparian proprietors to “wharf out” (as the common expression is) opposite their lands, and that the wharves so made become part and parcel of the upland to which they are united.

¹ Laws of R. I. (Ed. of 1822) p. 484.

² Udall v. Trustees of Brooklyn, 19 Johns. (N. Y.) R. 175; Striker v. Mayor, &c. of New York, Ib. 179.

The corporation of the city of New York hold, under their charter, on Manhattan Island, the *lands*, within the limits of the city, extending from high-water mark to four hundred feet below low-water mark into the East river. To this ownership is annexed "the right, benefit and advantage of all docks, wharves, cranes, and slips (or small docks,) within the city, with the wharfage, cranage and dockage, and all issues, rents, profits and advantages, arising, or to arise or accrue, by, or from, all, or any of them." By an act of the legislature, passed on the 7th of March, 1793, it is declared, that "all the right, title, interest, claim and demand, of the people of this state, of, in, and to all lands, at any time heretofore left for streets or highways, in the city of New York, by any person or persons whomsoever, shall be, and hereby is vested in the mayor, aldermen and commonalty of the city of New York, and their successors, for the use of streets and highways."

In the various grants by the corporation, of their water-lots on the northeasterly side of the coffee-house slip, they had given in fee, the right of wharfage in front, and in consideration of erecting certain piers, given to their grantees for twenty years, the wharfage, &c. of the southwesterly sides of such piers, provided they should not grant away the water-lots on that side, which they reserved to themselves a right to do, in which case, the wharfage on the southwesterly side was to cease.

The corporation having granted away the whole of the land to which they were entitled, under their charter, applied in April, 1798, to the legislature, for an act to authorize them to run streets or wharves, of seventy feet width, in front of the water-lots already granted. This, by a law of that month and year, (re-enacted on the 3d of April, 1801,) the legislature was pleased to grant; and by the same act, the proprietors of lots, on the front of which, the streets or wharves might run, were to fill them up, and make piers, according to the directions of the corporation. On non-compliance, the corporation were to be at liberty so to do, and receive the wharfage to their own use. It was also further provided, that the corporation might grant to such proprietors in fee, a common interest in such piers, in proportion to the breadth of their respective lots, under such restrictions, and within such limits as the mayor, &c. might deem just and proper.¹

Two years after the above act of 1801, the legislature passed an amendatory law which granted additional powers and rights to the corporation, by which the corporation were authorized, at their own expense, to cause public basins to be formed, and had power to take to their own use the wharfage and slippage, provided it did not deprive persons, who might have made piers by direction of the cor-

¹ Mayor, &c. of New York v. Scott, 1 Caines (N. Y.) R. 543.

poration, of any legal rights which they might have thereby acquired, or interfere with any private rights of property or privileges held under grants of the corporation. By the same amendatory law, in all cases where the corporation shall think it for the public good to enlarge any of the public slips, they have full power to do so ; and also upon paying one third of the expense of building the necessary piers and bridges, they shall be entitled to the slippage of the side of the piers adjacent to the slips, and also to one half of the wharfage to arise from the outermost end of the piers.¹ By the import of the words of this section, it was intended to apply to the case of public slips already formed, which the corporation might be desirous of enlarging, by an extension of the piers, or by sinking new piers at the sides of the mouths of the slips. According to its literal meaning, it cannot be seen, that it can authorize the making of a public slip in the first instance by sinking a pier or piers against the bulk-head or wharf opposite to private property.²

A person taking out a water grant from the corporation of the city of New York for a lot of fifty feet in front on the river, and binding himself to construct a wharf or bulk-head along the entire front of the grant, and thereupon being entitled to all the emoluments accruing from it, does not deprive him-

¹ See 228th and 230th parts of the general law of, 1813, 4 Webs. & Skinn. Ed. 414.

² *Verplauk v. City of New York*, 2 Ed. (N. Y.) Ch. R. 920.

self of the right to any portion of the wharfage, by dedicating a part of the lot to the public, for the purpose of a street or passage. Without an actual grant or conveyance from him as owner of the upland to which wharfage, or any other incorporeal hereditament is attached, he is entitled to all such incorporeal right, as he still retains the ownership of the soil.¹

By the city charter of New York, section 38, the land under the water of the East river, to the distance of four hundred feet from a line drawn from Corlear's Hook to Whitehall, was granted to the corporation in fee simple, with power to fill up and use the same. The legislature regulated this right in part, by the "Act for regulating the buildings, streets, wharves, and slips in the city of New York, passed April 3, 1801. The third section of that act authorized the corporation to lay out regular streets or wharves, of the width of seventy feet, in front of those parts of the city which adjoined to the East and North rivers, and to extend the same, with the progress of buildings, along those rivers. The fourth section provided, that such streets or wharves should be made at the expense of the proprietors of land adjoining, or nearest and opposite thereto, in proportion to the breadth of their several lots, and that the proprietors whose lots might not be adjoining to

¹ Verplanck, &c. *sup.*

such streets or wharves, should fill up and level at their own expense, the spaces lying between their lots and such streets or wharves, and should, upon so filling up and levelling the same, be respectively entitled unto, and become the owners of, the intermediate space of ground in fee simple. The same provisions were re-enacted in the revision of 1813. A married woman owned land on the East river, which the corporation of the city directed to be extended out into the river, in pursuance of the city charter and the laws of the state; and her husband caused the designated portion to be filled up, and the land was extended accordingly. It was held, that the land thus regained from the river, belonged to the wife, subject to the life estate in the husband. If the expense had been borne by the husband himself, the addition would have been as much an accession to the wife's property, as if he had erected a store upon her land.¹

The customary mode of apportioning wharfage in the port of New York, where several different persons own distinct portions of a bulk-head or wharf built in front of their respective lots, and a pier is built out in the river, at their common expense, covering or occupying the whole or part of the front of the portion of such bulk-head belonging to one of the proprietors, is, to distribute the wharfage arising

¹ *Dickinson et ux. v. Codman et al.* 1 Sand. (N. Y.) Ch. R. 214.

from the bulk-head between the piers, to and amongst the several proprietors rateably, according to the breadth of their respective lots, without any deduction from the proportion of that proprietor whose portion of bulk-head is covered and occupied, in whole or in part, by such pier, for the proportion so covered and occupied. Where the defendants were suffered to take the whole of the wharfage of a bulk-head for some years, upon the supposition of its belonging to them, and this was induced by long acquiescence or remissness on the part of the complainant, who at length asserted and proved his right; it was held, that he was entitled only to an account from the time of filing his bill. This rule applies only whenever there has been a mere adverse possession, and the delay in asserting the right is attributable to a plaintiff's own negligence or laches. If, however, there has been any *fraud* or wilful act on the part of a party in possession, by which the plaintiff has been prevented from calling for an account, or he is confessedly a trustee or guardian, bailiff or agent, then the above rule does not apply.¹

A colonial act of Maryland of 1745, ch. 9, s. 10, enacted, that "all improvements of what kind soever, either wharves, houses, or other buildings that have, or shall be made out of the water, or where it usually flows, shall, as an encouragement to such

¹ *Roosevelt v. Frost*, 1 Ed. (N. Y.) Ch. R. 579.

improvers, be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever."¹ The improvements authorized by this act were those made by improvers in front of their own lots, and not of their neighbors, and the right of improvement, in cases of conflicts between parties, arising from the curvature of the shores, is vested in the elder patent, and is not divested by any subsequent patent.²

By an act of assembly of Maryland, entitled, an act appointing wardens for the port of Baltimore, passed in 1783, c. 24, s. 2, it was among other things enacted, that certain persons therein named should be wardens for the port of Baltimore; and by s. 9, that from and after the publication of the same act, "no person or persons should make, alter or extend, a wharf or wharves, without laying before the said wardens a plan of his or their intended wharf or wharves, and without consent first obtained under the seal of the board, to carry the same into effect."³ But in order to vest a title in any such wharf, it is essential, by the provisions of the act of 1745, that the grantee should have completed it according to his permission.⁴ In execution of their duties, the

¹ *Giraud's Lessee v. Hughes*, 1 G. & Johns. (Md.) R. 219; *Harrison v. Sterrett*, 4 H. & McHen. (Md.) R. 540.

² *Wilson v. Inloes*, 11 G. & Johns. (Md.) R. 351.

³ *Smith et al. v. Yates*, 2 H. & McHen. (Md.) R. 244; *Wilson v. Inloes*, 11 G. & Johns. (Md.) R. 351.

⁴ *Giraud's Lessee, &c. sup.*

port wardens established a water-line called the "Port Warden's Line," beyond which no permission could be granted. Where permission was obtained to improve out to such line, by persons claiming under an elder patent, the intervening fast land made by natural or artificial causes, in front of their lots, vest in them, although in fact, in front of the land of a junior patentee. The ordinance of the city of Baltimore of 1823, ch. 19, which authorized the corporate authorities to contract with the owners of lots, for filling up the same into the water, and, in case of neglect or refusal to contract on the part of the owners, the improvement was to be made at their expense, which was to be a lien on the property, must inure to the benefit of the senior patent, where the city has made the improvement, upon the refusal of the proprietor; and the payment of the cost thereof, by another proprietor claiming under a junior patent, does not divest that right; nor would it be competent to the corporation of Baltimore to vary rights established in such cases, by the general law.¹

The act of Maryland of 1784, ch. 39, s. 6, which was intended to make such improvements as had been made in the harbor of Baltimore, a part of Baltimore town, saves to all persons the rights acquired under the above mentioned act of 1745, ch. 9, s. 10.²

¹ *Wilson v. Inloes, sup.*

² *Wilson v. Inloes, sup.*

CHAPTER VIII.

OF MARINE INCREASES — ALLUVION — SEA-WEED —
RELICTION — ISLANDS.

MARINE increases, or lands gained from the sea, are of three kinds :

1st. *Per alluvionem*, alluvion, or land, or what aids in the formation of land, washed up by the sea.

2d. *Per relictionem*, derelict land, or land left dry by the retirement of the sea.

3d. *Per insulæ productionem*, that is, islands and islets gradually or suddenly formed out of the sea, or at the mouths of rivers, &c.

1st. *Of alluvion and sea-weed.* Alluvion is called an increase *per projectionem*, which if slow and secret, and is so gradually and insensibly occasioned as to render impossible to perceive how much is added in each moment of time, it then belongs to the riparian proprietor to whose land the accession is made ; and none but riparian proprietors have a claim to it. Its gradual and imperceptible formation renders it no more a part and parcel of the bottom of the sea or river (*fundus maris*), which was before the property of the sovereign. Such is the doctrine of the Roman,

French, Spanish and Louisiana jurisprudence.¹ In 1765, the Marquis of Langeron owned a fief, to which was attached the right of *haute justice* upon the river Loire, by virtue of which he attempted to establish a claim to all the alluvions on that river, as being attached to his domain. His pretensions were however rejected, and the land formed by the alluvions on the river was adjudged to belong to the nuns of Marcigny, who claimed by virtue of riparian ownership.²

Such is also the doctrine of the common law. Indeed Bracton quotes the very words of the institutes: *Quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici quo ita paulatim adjicitur, ut intelligi non possit quantum quoque temporis momento adjiciatur.*³ The

¹ Inst. L. 2, T. 1, s. 20; and see the authorities cited by Edward Livingston, Esq. in his examination of the title of the United States to the Batture in New Orleans. 2 Hall's Am. Law Journ. 308. And see Civil Code of Louisiana. Gugot's Repertoire Universelle, 113.

² 5 Hall's Am. Law Journ. 167.

³ Bracton, L. 2, ch. 2. Both Bracton and Fleta copied copiously from the Imperial law, the Pandects of Justinian having been found at Amalphi about the year 1137, and having been, about the time of Bracton, a century afterwards, established in most of the forensic schools. Fleta is in general but a copyist from Bracton, and the latter has collected the first two chapters of his second book from the forty-first book of the Digest or Pandects, and the second book of the Institutes. Schultze (see *ante*, Preface) has thought it not improper to show a very striking resemblance between the doctrine of alluvion by the civil

common law is thus laid down by Blackstone: "As to lands gained from the sea either by *alluvion*, i. e. by the washing up of sand or earth, so as in time to make *terra firma*; the law is held to be, that if this gain be by little and little, by small and *imperceptible* degrees, — it shall go to the owner of the land adjoining, for *de minimis non curat lex*; but if the alluvion be sudden and considerable, the land shall go to the king as lord of the sea."¹ And such is recognized as the common law in this country.² In the case of *Adams v. Frothingham*,³ in Massachusetts, it was adjudged that whatever addition is

law and the common law, and by the law of a very remote nation. By the Gentoo laws, in a place where there is a river, the two banks of which are boundaries to the estates of two persons, if that river should break off some part of the bank on one side, and carry it over to the other, then the owner of that boundary upon which the other broken bank has fallen, shall become proprietor of that bank so broken; and the person whose bank is so divided shall no longer have any property therein; but if the river breaks off the whole of a person's land and carries it over to the boundaries of another person, in that case, the person whose ground is thus torn away shall still be owner thereof, and the person upon whose boundary such land has fallen, shall not be entitled to the possession thereof.

¹ 2 Bl. Com. 61. His authorities are Bracton, and Callis on Sewers; 2 Roll. Abr. 170, Dyer, 326. See also Hale, *De Jure Maris*, 27, 28; Hall's Rights to the Sea, &c. 122; *Stratton v. Brown*, 4 B. & Cress. R. 485; S. C. 10 Eng. Com. Law R. 384.

² *Dunlap v. Stetson*, 4 Mason (Cir. Co.) R. 349; *Ball v. Slack*, 2 Whart. (Penn.) R. 508; *Stratton v. Brown*, 4 B. & Cress. R. 485; S. C. 10 Eng. Com. Law R. 384; *Browne v. Kennedy*, 5 H. & Johns. (Md.) R. 200; *Giraud's Lessee v. Hughes*, 1 G. & Johns. (Md.) R. 249; *Lamb v. Rickets*, 11 Ohio R. 311.

³ *Adams v. Frothingham*, 3 Mass. R. 352.

made to shores of rivers, bays, coves, &c. by alluvion from natural causes, or from a union of *natural* and *artificial* causes, belongs to the owners of the shores. This decision was made in reference to the old colony law, which has been mentioned, which annexed the flats to the adjacent upland, to the distance of one hundred rods from the high-water mark. And whatever increase happens within these limits, and from whatever cause, is very properly assigned to him who owns the soil, to which the increase is attached.

In the delta of the river Mississippi, and in the country around the Gulf of Mexico, the most valuable lands have been made and are now forming by alluvial deposits of the floating soils brought down by the great rivers.¹ The case of the Batture in the city of New Orleans was an important controversy, as relates to the value of land in question, and to the able and learned discussions it elicited.

Battures are certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either wholly, or in part, by the annual swells. The batture, which was in this case the subject of controversy, was very considerable in extent, and had existed from time immemorial in front of the suburb of St. Mary. But for the aid of the natural depositum of the materials

¹ See Pollard's Lessee v. Hagan, App. p. cxi ; *ante*, note to p. 55, 56.

which constituted this batture, it was said, that New Orleans would probably never have existed, or that it would have been built but very slowly. The earth which it afforded, it was impossible to find elsewhere in the vicinity, so that the whole city, with its levees and streets, was completely dependent on it for its growth, safety, and protection.

The suit was brought in the superior court of the territory of Orleans, by Jean Gravier, against the corporation of New Orleans. It was a fact of public notoriety, that before the plaintiff set up his claim to the batture, which was in 1804, the inhabitants of New Orleans had always enjoyed the liberty of gratuitously taking from the batture all the earth which they required for their buildings, and that the Spanish government had ever taken the earth for public uses, such as raising the streets and repairing the levees of the city. It was further proved, that the Spanish government and the French government, which had preceded, had always evinced a settled determination to preserve to the inhabitants of New Orleans the free use of the batture, so useful and indispensable, not only for obtaining earth there, but to supply various other necessities not less urgent. To have permitted any individual to have appropriated the batture to himself, would have also devoted the population of the city to ravaging epidemics, and been of great detriment to the navigation and commerce. Accordingly, the Spanish government con-

stantly opposed the forming of any establishment on the batture, and at different times caused to be demolished the houses and other buildings which divers persons had ventured to erect there, at different periods.

In this situation of affairs, Louisiana was ceded to the United States. The great increase of commerce which succeeded this change of dominion, rendered it still more necessary to leave the batture free to the public, as it had till then been. This consideration suggested to Gravier, who was the former proprietor of the plantation on which the suburb St. Mary had been formed, the idea of raising a claim, which before he had not thought of, and prompted him to maintain that *batture* being *real* alluvions, the one in dispute belonged to him as riparian proprietor; and he was maintained by the court in the possession and enjoyment of the batture against the claim of the corporation of New Orleans. Afterwards, it became a question, whether Gravier, as the riparian proprietor, or whether the United States, were entitled to the batture.¹

In *New Orleans v. United States*, it was held, that land bounding upon the river Mississippi *having*

¹ See the opinion of Edward Livingston, Esq. in 2 Hall's Am. Law Journ. 307; and for other arguments and opinions, *Ib.* 295. For the defence of Mr. Jefferson, in taking possession of the batture, when President, in behalf of the United States, and Mr. Livingston's reply, 5 *Ib.* 1, and 113.

been dedicated to public use, or to the use of the city of New Orleans, the accumulations, by alluvial formations partake of the same character, and are subject to the same use as the soil to which they become united. If this were not the case, by the continual deposits of the river Mississippi, the city of New Orleans would, in the course of a few years, be cut off from the river, and its prosperity impaired. As the city has a *just claim* to the original dedication to the river, it has all the rights and privileges of a riparian proprietor; and this, in this case, not only upon the consideration, that every proprietor whose land is thus bounded, is subject to loss by the same means which may add to his territory, for which loss he is without remedy; but upon another consideration of much weight, viz: the city, from time immemorial, had been compelled to construct at great expense, and keep in repair, levees, which resist the waters of the river, and preserve the city from inundation.¹

In the case of the *King v. Lord Yarborough*, the argument was upon the word "*imperceptibly*;" and in behalf of the crown two passages were cited from Hale's *De Jure Maris*, wherein that writer speaks of land gained by alluvion, as belonging generally to the crown, unless the gain be so insensible, that it cannot *by any means*, according to the words of one of the passages, or *by any limits or marks*, according

¹ *New Orleans v. United States*, 10 Peters (U. S.) R. 662.

to the words of the other passage, be found, that the sea was there; *idem est non esse et non apparere*. This led to the following interpretation of the legal meaning of the word "imperceptible" by the court, the opinion of which was delivered by Abbott, J., as follows: "In these passages, Sir Matthew Hale is speaking of the legal consequence of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible in itself, but considers that as being insensible, of which it cannot be said with certainty that the sea ever was there. An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also, upon the strength and direction of the wind, which are different almost from day to day. And therefore, these passages from the work of Sir Matthew Hale are not properly applicable to this question. And considering the word 'imperceptible' in this issue, as

connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time. And taking this to be the meaning of the word 'imperceptible,' the only remaining point is, whether the accretion of this land might properly upon the evidence be considered by the jury as imperceptible. No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month. One witness, who appears twice to have measured the land, says, 'that within the last four years, he could see that the sea had receded,' but he could not say how much; the same witness said, 'that it certainly had receded since he measured it last year,' but he did not say how much; and, according to his evidence, the gain in a period of twenty-six or twenty-seven years, was on the average about five yards and a half in a year. Another witness speaks of a gain of 100 to 150 yards in fifteen years; a much greater increase than that mentioned by the first witness; and this second witness adds, that during the last five years there had been a visible increase in some parts of from thirty to fifty yards. Upon the evidence of this witness, it is to be observed, that he speaks very loosely, the difference between 100 and 150 in fifteen years, and between thirty and fifty in five years, being very great.

The third witness said there had been some small increase in every year. The fourth witness said, 'the swarth increases every year gradually, and *perhaps* it had gathered a quarter of a mile in breadth in some places within his recollection, or during the last fifty-four or fifty-five years, and in some places it had gathered nothing.' And this was the whole evidence on the subject. We think the jury might, from this evidence, very reasonably find that the increase had not only been slow and gradual, but also 'imperceptible,' according to the sense, in which, as I have before said, we think that word ought to be understood."¹

Land formed by alluvion is, in general, to be divided among the riparian proprietors entitled to it according to the following rule: Measure the whole extent of their ancient line on the river, and ascer-

¹ The King v. Lord Yarborough, 3 B. & Cress. R. 91; S. C. 10 Eng. Com. Law R. 19; S. C. affirmed in the House of Lords, 2 Bligh R. (N. S.) 147; 1 Dow R. (N. S.) 176. In the controversy respecting the *batture* at New Orleans, when it was urged, that it was not alluvion, because its increase *was perceptible*, after every swell of the Mississippi, it elicited from Mr. Livingston the following reply: "When the ingenious counsel can analyze the different deposits, separate the sands of the Red river, the rich mould of the Missouri from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of the precious deposit, and date the existence of each stratum of its increase; then this first branch of the authority he has cited (*quantum quoque temporis momento adjiciatur*) may be applicable to his cause." 2 Hall's Law Journ. 307.

tain how many feet each proprietor owned on this line ; divide the newly formed river line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line ; and then draw lines from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. This rule is to be modified under particular circumstances ; for instance, if the ancient margin has deep indentations, or sharp projections, the general available line on the river ought to be taken, and not the actual length of the margin, as thus elongated by the indentations or projections. This rule is found in a work of the civil law entitled a " Collection of New Decisions by Denisart,"¹ and was adopted by the supreme court of Massachusetts in *Deerfield v. Arms*.² Analogous to this case is the case of the division of flats-ground in Massachusetts and Maine, conformably to the colony ordinance of 1641.³

It is consistent with the explanation which has been given of the legal meaning of "imperceptible" increase, that *sea-weed* deposited upon the shore by natural means, below the ordinary high-water mark, should belong to the riparian proprietor bounding

¹ Published in France in 1783. The rule is found in the work referred to under the title *Attérissement*.

² *Deerfield v. Arms*, 17 Pick. (Mass.) R. 41.

³ For which see *ante*, Chap. VII. p. 232, 233.

opposite; and it has so been held. In *Emans v. Turnbull*, in New York, the question who had the right to sea-weed came directly before the court, when the opinion of the court was given by Kent, C. J., as follows: — “Sea-weed thrown up by the sea may be considered as one of those marine increases arising by slow degrees, and according to the rule of the common law, belongs to the owner of the soil. The rule is, if the increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign. Sea-weed is supposed to have accumulated gradually. The slow increase, and its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea, to which other parts of his estate may be exposed. This is the sound reason for vesting the maritime increments in the proprietor of the adjoining land. The *jus alluvionis*, in this respect, ought to receive a liberal encouragement in favor of private right.”¹

In Pennsylvania a riparian proprietor has exclusively a qualified right to the shore to low-water mark;

¹ *Emans v. Turnbull*, 2 Johns. (N. Y.) R. 313. This case is cited and the decision assented to by the supreme court of Massachusetts, in *Phillips v. Rhodes*, 7 Met. (Mass.) R. 329.

that is, though his right is not the same, in all respects as to the main land above the bank, because a vessel or raft may sail over the shore at high tide, yet he has the sole right to quarry stones or take gravel, above low-water mark;¹ from which, it may be argued, *a fortiori*, that he has the sole right to sea-weed.

But the right to take sea-weed *below* low-water mark on the bed of a navigable river, is in the public, and not exclusively in the riparian proprietor. This was expressly held by the supreme court of Connecticut, in a case in which they recognize the decision in *Emans v. Turnbull*, in New York, as founded upon the just considerations therein set forth; but in the case before them, the sea-weed was not collected on the *shores*, but grew and accumulated, *below* low-water mark. In no sense then, say the court, could the adjoining proprietor be entitled to any exclusive right to it.² Sea-weed thrown upon the upland by *extraordinary* tides most clearly belongs to the riparian proprietor upon whose land it is thus thrown, inasmuch as his upland is bounded by the *ordinary* high-water mark;³ and this has been expressly determined.⁴

¹ Per Huston, J., in giving the opinion of the court in *Hart v. Hill*, 1 Whart. (Penn.) R. 137.

² *Chapman v. Kimball*, 9 Conn. R. 38.

³ See *ante*, as to what is legal high-water mark. Chap. III. p. 68-72.

⁴ *Lowe v. Govett*, 3 B. & Adol. R. 967; S. C. 23 Eng. Com. Law R. 963. In Lord Hale's treatise the only instance in which the word

In Massachusetts a riparian owner, it has already been shown, owns the flats to low-water mark, under the colonial ordinance of 1641,¹ and it has been held, that under it, a person is not authorized to take "muscle bed manure" from the flats of another person, between high and low-water mark.² The sea-weed which is thrown up, also belongs to the owner of the beach, and so is the subject of grant. The heirs of an owner of real estate, which was bounded in part by a sea beach, divided the estate by deed, and assigned to some of them parcels of land bounded by the beach, and to the others different parcels. The deeds assigning the latter parcels granted the privilege of getting sea-weed from the beach below the lands granted by the deeds of the former parcels. It was held, that this was a grant of an incorporeal hereditament appurtenant to the land to which it

sea-weed is used, is where he mentions the constant and uninterrupted taking of it by the proprietor of the adjoining estate, as one of the usual means of showing that the space between high and low-water marks, is a part and parcel of the estate. "The shore" (he says) "may be part and parcel of a manor, and the evidences to prove this fact, are commonly these; constant and usual fetching gravel and *sea-weed* and *sea-sand*, between the high and low-water mark, and licensing others so to do." This passage would seem to indicate that the learned author considered the public to be, *primâ facie*, entitled to sea-weed. For if he had not so considered it, then the circumstance of its being exclusively taken by the lord of the manor, could not be received as a proof of his adverse right of property in the shore.

¹ See *ante*, Chap. VII. p. 224, *et seq.*

² *Moore v. Griffin, & Shep.* (Me.) R. 350.

was annexed, and not a right in gross; and that it could not be severed and sold separate from that land. And also, that the owner of the privilege was not bound to use the sea-weed on the land to which the privilege was annexed, but might use it on his other land, or dispose of it to other persons, or lease his share of the privilege while he should continue to be the owner of the land to which it was annexed. And further, that the grantees of the privilege were not affected by the gradual shifting of the boundaries of the beach, by the action of the sea, but were entitled to take sea-weed from the beach, wherever the beach might be, below the land as bounding on it.¹

An averment of a lost grant from the owner of a beach in Massachusetts, to the inhabitants of a town, in their corporate capacity, to the use of all the inhabitants thereof, to take sea-weed for manuring their lands, is not supported by evidence, that individuals of the town had been accustomed from a very early period of time to take sea-weed from the beach for that purpose. The defendant, in support of his plea of a grant, relied upon proving, that the inhabitants of Chelsea had long been used to take sea-weed from the beach, and expected to show from the length of time and the extent of this usage, that it would support the plea of a lost grant; and sev-

¹ Phillips v. Rhodes, 7 Met. (Mass.) R. 322.

eral persons, inhabitants of the town, were offered as witnesses, who were rejected. The court, without deciding, whether the inhabitants of Chelsea were incompetent on the ground of interest, were of opinion, that the evidence was rightly rejected, on the ground that it had no tendency to prove the issue tendered by the defendant. The evidence offered, was the testimony of witnesses to prove that sundry inhabitants of Chelsea had, from a very early period, been used to take sea-weed from the beach in question, for the benefit of their lands. The grant pleaded was, of a right and privilege of the town of Chelsea, *as an ancient corporation*, to the use of *all of the inhabitants thereof*, to take sea-weed; and this was the fact to be proved. The court said, that however strongly the fact, that certain individuals, however numerous, had been in the habit of taking sea-weed from the beach for their own use, might tend to show a grant to themselves, or their ancestors, either as a personal privilege, or as a privilege to them in right of their being owners and occupiers of particular estates, it would have no tendency to prove a grant to the town as a corporation.¹

2. *Per relictionem*, or by reliction, which is an increase by the retreat or receding of the water.

This increase has been known in some parts of the world to occur suddenly, and to a very great ex-

¹ *Sale v. Pratt*, 19 Pick. (Mass.) R. 191.

tent. Lord Hale relates, that sometimes the ocean, especially the narrow sea between England and France and the Netherlands, leaves the English shore in a very considerable measure; possibly by reason of some superundation on the eastern shore.¹ In such cases, the land left dry by the receding of the water, is the property of the sovereign, as being a part and parcel of what previously was the sovereign demesne. The right of property in the soil, in other words, is not changed by such change of the water; ² so that in this country, soil covered by tide water and thus relict and left dry, remains the property of the state.³ But if the soil when covered by water, belonged to an individual, then, though relict, it continues to belong to him. As, if an individual has acquired by a grant from the government the exclusive right of property in the soil of an arm of the sea, and the water should afterwards recede from it, the soil thus left bare will still be his. Of course the right of the riparian proprietors to their upland, which is inundated by an encroachment of the sea and then left dry, is still retained; and by their art and industry, they may regain the upland so inundated, even when (according to Coke and Foster,

¹ *De Jure Maris*, Harg. Tracts, 30.

² *Ib.* 14, 15, 30, 31.

³ Per Daggett, J., in *Chapman v. Kimball*, 9 Conn. R. 41; and see *ante*, Chap. II.

⁴ *De Jure Maris*, Harg. Tracts, 15.

7 Jac. C. B. cited by Lord Hale) the land has been inundated for the space of forty years; and one hundred acres, parcel of a manor, was regained from the river Thames and enjoyed accordingly.¹ Sea water has been justly compared to a common enemy, against which every man may defend himself as he can; and in this respect it is different from an occasional course of superabundant inland water-flowing in the usual direction, and the ordinary channel has become insufficient to carry it off. In the one case, if the works of a riparian proprietor to defend or regain his banks be successful, the water is prevented from coming where it never before had come; in the other, it is prevented from passing in the way, in which, when the occasion happened, it had been accustomed to pass, which is illegal.²

But the same rule holds as to *slow* and *imperceptible* increase, with respect to *reliction*, as holds with respect to *alluvion*; that is, although it be true, that if the sea leaves any shore by a sudden falling off of the water, the land derelict belongs to the state, yet if the falling off be by insensible degrees, it becomes a part and parcel of the land adjoining.³ In *Rex v. Lord Yarborough*, it was considered, that land formed by the *gradual* declining of the sea is the property

¹ Precedent cited by Hale, *ub sup.*, E. 2, Rot. 174, B. R.

² *Rex v. Trafford*, 1 B. & Adol. R. 874; S. C. 2 Eng. Com. Law R. 498.

³ Bac. Abr. Tit. *Prerogative*.

of the owner of the adjoining land ; but otherwise, if suddenly left by the sea.¹ A gradual reliction can seldom, if ever, happen, however, without some degree of alluvial increase ; and it has already been shown, that if the alluvial character predominates, it is taken as a part of the land with which it has formed a coalition. If the shore of an arm of the sea be conveyed by the government, the shore, or the space for the time being, between the low-water mark, and the ordinary high-water mark, though those limits be changed, passes to the grantee.²

3. *Per insulæ productionem*, or islands gradually or suddenly formed out of the sea or “ navigable ” rivers.

When islands are formed, it is either by the desertion of the water, or by the collection and exaggeration of sand and other substances which become discoverable as *terra firma*, environed by the water ; and of course therefore they are *primâ facie* the property of the sovereign ; they having before constituted a part of that soil in which the sovereign *primâ facie* has the right of property.³ But the same exception holds with respect to islands formed, as holds with respect to suddenly relict soil ; that is, though of common right, in common

¹ *Rex v. Lord Yarborough*, 3 B. & Cress. R. 91, cited more fully *ante*, p. 255.

² *Stratton v. Brown*, 4 B. & Cress. R. 485.

³ Bl. Com. 251 ; Hale, *De Jure Maris*, Harg. Tracts, 17 ; Callis on Sewers, 45.

presumption, they belong to the sovereign, yet when the interest in the soil has been acquired by grant from the government by an individual, an island which may happen to be formed within the limits of the private ownership, will be his.¹ "Of common right, and *primâ facie*," says Hale, "it is true that they (islands) belong to the crown, but where the interest of such *districtus maris*, or arm of the sea, or creek, or haven, doth belong to a subject, either by charter or prescription, the islands which happen within the precincts of such private propriety of a subject will belong to the subject, according to the limits and extent of such propriety."²

So if the water should divide itself, and unite in another place, and thus environ a portion of upland, and so reduce it into the form of an island, the land so environed continues to be the property of the former owner.³ By the erection of Fairmount dam, in the river Schuylkill, a *rock* that had formerly been private property, became surrounded by water, and

¹ 2 Bl. Com. 251 ; Hale, *De Jure Maris*, Harg. Tracts, 17 ; Callis on Sewers, 45.

² *De Jure Maris*, Part 1. Chap. vi. It was lately stated in a newspaper, that for a long series of years, an island has been gradually formed between Wittonness and Oysterness, in the Humber, and that its present extent is about 300 acres. In conformity with the law contained in the above extract from Lord Hale, the property of this island seems to have been admitted to be in the crown. 28 Lond. Law Mag. 339.

³ *Ib.*

was dry only at low tide, and a few hours before and after. It was held, that it still remained private property, and hence was not common for all persons to stand upon, and fish with hoop nets. There was no difference between a rock under these circumstances, and land so environed as to become an island.¹

Avulsion is where, by the immediate and manifest force and violence of the water, the soil is taken suddenly from one man's estate, and carried to another's, and hereby a new property is constituted only by *acquiescence*. For it is regarded as the property of the first owner, unless it shall have continued on the other's land for so long a period, that it has coalesced and become incorporated with the soil.² And the Roman law provided, *that if the impetuosity of a river should sever a part of your estate and adjoin it to that of your neighbor, it is certain that such part will still continue yours.*³

¹ *Commonwealth v. Shaw*, 14 S. & Rawle (Penn.) R. 9.

² Bract. 221; Callis, 21, 24; 2 Bl. Com. 262.

³ Coop. Just. L. 2, t. 1.

CHAPTER IX.

CUSTOM AND PRESCRIPTION.

REFERENCE has several times been made in the preceding pages to rights which may be acquired in tide water, and in the soil and shores of the same, by *custom* and *prescription*. In *Carter v. Murcot*,¹ it was said by Lord Mansfield, that a man may have an exclusive privilege of *fishing* in an arm of the sea, though such a right is not to be presumed; and Yates, J., in the same case, observed, that he knew a case to fail where an exclusive right was claimed, because no *prescription* was proved. So, in this country, in *Gould v. James*,² it was held, that if any one can show an exclusive right of fishery, by prescription, he may then exercise it; though every presumption is against him, unless he can establish his prescriptive right by satisfactory proof. Parker, C. J., in *Commonwealth v. Charlestown*,³ says, — “By the common law it is clear, that *all arms of the sea*, &c., where the tide ebbs and flows, are the pro-

¹ *Carter v. Murcot*, 4 Burr. R. 2162.

² *Gould v. James*, 6 Cowen (N. Y.) R. 376.

³ *Commonwealth v. Charlestown*, 1 Pick. (Mass.) R. 180; *Parsons*, C. J., lays down the same doctrine in *Storer v. Freeman*, 6 Mass. R. 435.

perty of the sovereign, unless appropriated by some subject by virtue of a grant or *prescriptive* right, which is founded on the supposition of a grant." And in *Keen v. Stetson*,¹ it is laid down, that — "it is true, individuals may acquire the right by grant or prescription, to *occupy flats with wharves and stores, and landing places*," they say, in some of the towns in that state (Massachusetts) have existed by immemorial usage, on the banks, and perhaps on the shores, of creeks and rivers." So the public may be excluded, (as fully appears by the treatise of Lord Hale, and by the opinions of the judges in *Blundell v. Catterall* at the end of this volume,) by immemorial *custom*.²

Though both custom and prescription are created by *usage*, yet there is between them this difference: viz. the former is a *local* usage, that is, one which relates to a particular *place*; while prescription is merely a *personal* usage, as that A. and his ancestors, or those whose estate he has, have been used, time out of mind, to enjoy a certain advantage or privilege.³ They both originally derive their obli-

¹ *Keen v. Stetson*, 5 Pick. (Mass.) R. 492.

² See *Blundell v. Catterall*, App. p. i.

³ 1 Bl. Com. 75; 2 Ib. 263, Co. Litt. 110, 113. Custom is defined by Mr. Greenleaf, as "unwritten law, established by common consent and uniform practice, from time immemorial; and it is local, having respect to the inhabitants of a particular place or district. It differs from prescription, in this, that prescription is a personal right, belonging to one or few persons, by particular designation, as for example,

gation from the *consent*, either express or implied, of the parties who are bound by them ; and the ordinary forms of pleading a right by custom and a prescriptive right are the same. The same rights and privileges which may be claimed as a custom, may also be claimed by prescription. An easement upon another's land, such as a right of way to the shore,¹ a right of drawing seines,² a right to tow on the banks of navigable rivers,³ may be sustained as a custom, or as a prescription.⁴

But although there are rights which may be holden by virtue of a custom, can be holden by virtue of prescription, it is not a rule *vice versa*. A distinction is taken between a *profit* taken from the soil of another and an *easement* upon the soil. Profits, or rights *a prendre*, as the rights of taking herbage by cattle, of taking turves, peat or coal, cannot be alleged as in the inhabitants of a town or district by virtue of a local custom. Such a claim must be sustained as a prescription, by an individual though

the owners of a certain parcel of land." 2 Greenl. on Ev. § 248. And see *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) R. 357.

¹ See *ante*, p. 189.

² See *ante*, p. 193.

³ See *ante*, p. 176.

⁴ See a learned opinion of the court in *Perley v. Langley*, 7 N. Hamp. R. 233 ; and see also the opinions of the several judges in *Carson v. Blazer*, 2 Binn. (Penn.) R. 475 ; and in *Post v. Pearsall*, 22 Wend. (N. Y.) R. 425 ; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) R. 357.

his ancestors, or in the name of a corporation and its predecessors, or as appurtenant to some estate holden by the claimant.¹ The inhabitants of a town, as such, cannot claim a right of common, or other profit in *alieno solo*, as a custom, for the inhabitants may not have the inheritance.² A custom to fish in *alieno solo* in an unnavigable river, is not a good custom; and such a right to fish, if available at all, must be set up by prescription as belonging to some estate, and should be pleaded with a *que estate*.³ The inhabitants of a town or village cannot claim a right to take sand to mix with lime, for the purpose of making mortar, from the land of another, as a custom, though a right to do so may be pleaded in an individual and his ancestors, or through a corporation and its predecessors, or in a *que estate*, as a prescription.⁴

Different persons may have an easement upon the same land by different titles, one by grant, another by prescription, and a third by custom; and each must plead his own title, which, if he proves, it is

¹ *Perley v. Langley*, *ad sup.*; *Waters v. Lilley*, 4 Pick. (Mass.) R. 145.

² Co. Litt. 113 b.; *Gatewood's case*, 6 Rep. 60; 2 Cro. R. 152; Com. Dig. Prescript. 8 H.; *Meller v. Spateman*, 1 Saund. R. 346; *Grumstead v. Marlowe*, 4 T. R. 717; *Post v. Pearsall*, 22 Wend. (N. Y.) R. 425.

³ *Waters v. Lilly*, *sup.*

⁴ *Perley v. Langley*, *sup.* See also *Sale v. Pratt*, 19 Pick. (Mass.) R. 191.

sufficient, although he may also prove a title in another; provided the titles are distinct and not inconsistent with each other.¹

Although a several fishery in an arm of the sea may be prescribed for, and may pass as a privilege appurtenant to an estate,² yet a prescription for a *common* of fishery therein as appurtenant to an estate, is bad. Thus, in *Ward v. Cresswell*,³ the court held, that, as all the subjects of England might of common right fish in the sea, &c. a prescription for it, as appurtenant to a particular township, was void, and as absurd, as a prescription would be for travelling the king's highway, as appurtenant to a particular estate.

A right of fishery acquired by prescription is divisible, that is, it may be lost as to part and preserved as to part. As it was adjudged in the case of *Rogers v. Allen*,⁴ an exclusive right to dredge for *oysters* might subsist in a navigable river, as appurtenant to a manor, although the public had the right to the *floating fish*.

The prescription must be proved to be as extensive as it is laid;⁵ so that, if the right is shown to

¹ *Kent v. Waite*, 10 Pick. (Mass.) R. 138.

² *Carter v. Murcot*, *ante*, p. 270; *Bagott v. Orr*, 2 Bos. & Pull. R. 472; *Mayor &c. v. Richardson*, 4 T. R. 437.

³ *Ward v. Cresswell*, Willes, R. 285.

⁴ *Rogers v. Allen*, Campb. R. 309.

⁵ *Rogers &c. sup.* Hob. R. 64.

exist in three out of four places, and not in the fourth, the variance is fatal; notwithstanding the alleged trespass is committed where the sole and exclusive right of fishery prescribed for, is proved to exist. But if the prescriptive right in question, is made to appear to be more ample than that claimed, the party prescribing will not fail in consequence.

The use of all privileges relating to tide waters, being *prima facie* common to all, the use by any person of any one of them, however long continued, is nothing more than the exercise of a right he has in common with others; and therefore in order to acquire an exclusive right by long continued usage, or by prescription, the use must be in a manner inconsistent with, and adverse to, the common right. The mere exercise of a common right, however long continued, has never been considered as conferring an exclusive right. Thus, the grant of a several fishery in a public navigable river, cannot be presumed, it has been held, from the mere uninterrupted enjoyment of the privilege of fishery.¹ If such presumption can be made at all from the fact of such enjoyment, it must be shown to have been in exclusion of the right of others; and the absence of an averment to that effect, in a bill praying for an injunction to protect what was claimed as an exclusive right, it has been held, was fatal to the complainant's case.² As

¹ Chalker v. Dickinson, 1 Conn. R. 382. Ib. 510.

² Delaware & Maryland Rail. Ro. Co. v. Stump, 8 G. & Johns. (Md.) 479.

was said by Gibbs, C. J., if a person wishes to protect his exclusive possession, he must keep up the evidence of his right by guarding it against intruders, though the flowing of the tide is not absolutely inconsistent with the right of private property.¹ In *Palmer v. Hicks* in New York,² the court say, "we will not presume a grant of lands under navigable waters to the owners of the adjacent soil, without evidence of long *exclusive* possession and use to warrant such presumption." And on this ground, the court held, that the town of Flushing was not entitled to the right which it claimed to regulate the use of the lands below low-water mark.

As to the witnesses by whom acts of exclusive ownership and enjoyment may be proved: Where the issue does not affect any common right claimed by prescription, as belonging to the estate of A., one who claims a prescriptive right of common in right of his own estate, may be a witness; for though A. may have such right of common, it does not follow that B. has; nor would the verdict in the action of A. be evidence in B.'s action. But if the issue be on a right of common, which depends on a custom *pervading the whole manor*, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be

¹ *Miles v. Rose*, 5 Taunt. R. 705. And See *Ward v. Cresswell*, Willes, R. 285.

² *Palmer v. Hicks*, 6 Johna. (N. Y.) R. 133.

evidence in a subsequent action brought by the very same witness to try the same right; and therefore there is good reason for not receiving his testimony in such a case. But the same reason does not hold where common is claimed by prescription in right of a particular estate.¹ In other words, a commoner cannot be a witness to support the right of his fellow commoner, nor can an inhabitant of a particular place, be a witness to prove a prescriptive right common to all the inhabitants of that place;² but one may be a witness to support a right by prescription in respect of another's estate, though the witness claim to prescribe in respect to his own estate, upon the same facts he is called to establish. The inhabitants of Loyd's Neck, in New York, claimed by prescription an exclusive right of fishing for oysters, *opposite their respective farms*, in an arm of the sea. In an action of trespass by one of them, for a violation of this claim, another interested as a remainder man in a farm adjoining the *locus in quo*, at Loyd's Neck, was offered as a witness for the plaintiff, and it was held he was admissible. The witness was interested only in the question, and not in the event of the suit.³

¹ Phil. Ev. 47; *Watson v. Shelby*, 1 T. R. 302; *Jacobson v. Fountain*, 2 Johns. (N. Y.) R. 170.

² *Gould v. James*, 6 Cow. (N. Y.) R. 369; *Jacobson v. Fountain*, 2 Johns. (N. Y.) R. 170.

³ *Gould v. James*, *sup.*

The question in *Lufkin v. Haskell* in Massachusetts,¹ was whether the inhabitants of the town of Gloucester, in that state, were competent witnesses to prove a right in each and all the inhabitants, to dig clams in the soil of the plaintiff, admitting it to be his soil. The court thought it unnecessary to decide whether the defence set up was a good custom or not; inasmuch as they thought, that each inhabitant being directly interested in the right contended for, and the verdict upon the custom being evidence against the plaintiff, in all future controversies with any inhabitant upon the same point, by the common law they were not competent. In *Moore v. Griffin*, in Maine,² it was held, that where an individual attempts to establish a common right in all the inhabitants of a town to enter upon the flats of another, and take therefrom "muscle-bed" manure, an inhabitant of the town is not a competent witness to establish such right. The court in this case, also, thought it unnecessary to decide whether such a custom could be established by any proof. In both Massachusetts and Maine, as appears by the above cases, an inhabitant of a town is rendered a competent witness, by statute, only in cases in which the town, in its *corporate* capacity, is a party, or interested in the suit.

¹ *Lufkin v. Haskell*, 3 Pick. (Mass.) R. 356.

² *Moore v. Griffin*, 9 Shep. (Me.) R. 350. See also *Sale v. Pratt*, 19 Pick. (Mass.) R. 191.

In *Jacobson v. Fountain*, in New York,¹ in an action of trespass against certain persons, inhabitants of Staten island, for building fishing huts, and fishing on lands claimed and possessed by the plaintiff, one of the inhabitants was offered as a witness, on behalf of the defendants to prove a common right by a use of sixty years, in all the inhabitants of the island, to the fishery in question, and it was held that he was incompetent on the ground of interest. A release offered by the witness to the plaintiff was refused; and a release to another for the use of all the inhabitants, except himself; but it was held, that such a release was inoperative, and could not remove the objection of interest. A witness on the part of the plaintiff, was however admitted, though an inhabitant, as he could have no interest in the event of the suit, and the verdict could never be given in evidence in a cause between him and the plaintiff; and besides, as an inhabitant of Staten island, claiming a common fishery, his interest was against the plaintiff.

To constitute a good prescription, according to the old writers on the common law, the usage must have existed time out of mind, or in other words, it must be proved to have commenced before the reign of Richard I.² In this country, it has been consid-

¹ *Jacobson v. Fountain et al.* 2 Johns. (N. Y.) R. 170.

² Bl. Com. 75; 2 Ib. 963.

ered, that the country has been settled long enough to allow of the time necessary to prove a prescription;¹ and that the time of legal memory does not extend farther back than *sixty* years.² Indeed, at this day, in England, if a privilege has been enjoyed a considerable number of years, the presumption is, that it has existed time out of mind. Thus was it held in *Hill v. Smith*,³ that toll taken for *forty* years was evidence of a prescriptive right. In *Chad v. Tilsed*,⁴ an embankment had been continued *forty* years across a small bay, by an individual who had treated it as his exclusive property, by repeated assertion of property, and a uniform acquiescence therein. The usage was held to be as strong as possibly could be; and therefore, although the erection of the bank more than forty years ago, would not of itself confer a title, it was held, that from such erection unopposed, and the subsequent uniform usage, prior usage to the same effect might be presumed.⁵

¹ *Rust v. Low*, 6 Mass. R. 90.

² *Coolidge v. Learned*, 8 Pick. (Mass.) R. 504.

³ *Hill v. Smith*, 10 East, R. 476.

⁴ *Chad v. Tilsed*, 2 Brod. & Bing. R. 403; S. C. 6 Eng. Com. Law R. 171.

⁵ The question arose in *Coolidge v. Learned*, in Massachusetts, as to the length of time requisite to create a prescriptive right to a parcel of land for a landing place adjoining Charles river. This question was fully considered by Wilde, J., who delivered the opinion of the court. He considered it extraordinary that the time of legal prescription should

The witness for the plaintiff in *Jacobson v. Fountain*,¹ (the objection against whose testimony was overruled,) testified, that he lived in and near the *locus in quo* for seventeen or eighteen years; that it consisted of a beach adjoining Hudson river near the *Narrows*; the premises in question, including the beach, and the right of fishing, were hired by him

continue to be reckoned from so distant a period as the reign of Richard I., and it seemed, he said, to the court that, for all practical purposes, it might as well be reckoned from the creation. The limitation was founded on the equitable construction of the statute *West. 13 Ed. I. c. 39*, which provided, that no writ of right should be maintained except on a seisin from the time of Richard I. When the limitation of a writ of right was reduced by the statute *32 Hen. VIII. c. 2*, to sixty years, a similar reduction should have been made in the limitation of time of legal memory. This was required not only by public policy, to quiet long continued possessions, but by a regard to consistency, as it would have been following up the principle upon which the first limitation was founded. No solid and satisfactory reason appeared, why the opinion of Rolle (2 Abr. 269), that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession, was not adopted by the courts. But it did appear, that the principle on which his opinion was founded was respected and carried into operation in another form; for although the courts continued to adhere to the limitation before adopted, yet the long enjoyment of an easement was held to be a sufficient reason, not only to authorize, but to require a jury to presume a grant. In the one case, the grant is presumed by the court, or rather is presumed by the law, and in the other case, it is presumed by the jury under the direction of the court. As Starkie remarks, "it seems to be very difficult to say, why such presumptions should not at once have been established as mere presumption of law, to be applied to the facts, without the aid of a jury." *Coolidge v. Learned*, 8 Pick. (Mass.) R. 504. The views of the court in this case are sanctioned in the subsequent case of *Melvin v. Whiting*, 10 Ib. 297.

¹ *Jacobson v. Fountain et al.* 2 Johns. (N. Y.) R. 170.

about sixteen or seventeen years ago of one C. V. and one A. J., through whom the plaintiff derived title ; all who fished there paid a consideration to the witness for the privilege of fishing, during thirteen years, and two of the defendants did the same. The first lease to the witness was for three years, and the second, for the residue of the time he had occupied. By an agreement with the plaintiff he was to pay him one fourth of the fish caught, for the privilege of fishing. Four or five years ago, the plaintiff built a house under the bank on the road, which the witness occupied as a tavern ; and before 1802, the plaintiff had put up advertisements, forbidding persons to fish there without license. In 1802 and in 1803 the defendants built fishing huts, and fished there during the season. It was held by Thompson, J., who delivered the opinion of the court, that the sole and exclusive possession of the plaintiff was sufficiently and fully proved, and he accordingly had judgment. It was proper, the learned judge observed, for the jury, in assessing the damages, to take into consideration the injury the plaintiff had sustained by the defendants' interfering with, and encroaching on, his rights. This, he said, was the *gist* of the action ; and thus far, and no farther did the judge direct the jury, with respect to the rule of damages.

Not only the exclusive right of fishery in salt and tide waters, but also the exclusive right to the *shores*

and *soil* thereof, may be acquired by prescription and custom. Hence, all those marine increases which were stated in the chapter preceding as *prima facie* belonging to the sovereign power, may become the property either of an individual, or of a particular town or district. Usage may make it the property of the owner of the estate to which it is annexed; as was the case in the claim made by the Abbot of Peterborough to thirty acres of land thrown up by the sea, which was questioned at the suit of the king. The judgment was in favor of the Abbot, on the ground of the custom which prevailed in that part of the country, that the lords of manors bounding on the sea appropriated to themselves all alluvial increases.¹

The following important precedent in relation to evidence of property acquired in arms of the sea, &c. by usage, is afforded by the treatise of Lord Hale.²

In Scaccario Car. upon the prosecution of Sir Sackville Crow, there was an information against Mr. John Smith, farmer of Lord Barclay, setting forth that the river of Severn was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Gloucester and Bristol, and that the river had left about *three hundred* acres of ground

¹ Hale, *De Jure Maris*, Harg. Tracts, 29.

² *Ib.* 34.

near Shinbridge, and therefore they belonged to the king by his prerogative.

Upon the evidence, it appeared by unquestionable proof, that the Severn, in the place in question, was an arm of the sea, flowed and reflowed with salt water, and was part of the ports of Gloucester and Bristol, and that within time of memory these were lands newly gained and inned from the Severn ; and that the very channel of the river did, within time of memory, run in the very place where the land in question lies, and that the Severn had deserted it, and the channel then run above a mile towards the west.

On the other side, the defendant claiming under the title of Lord Barclay alleged the following matters whereupon to ground his defence.

1st. That the barons of Barclay were, from the time of Hen. 2, owners of the great manor of Barclay.

2d. That the river Severn, *usque filum aquæ*, was time out of memory parcel of that manor.

3d. That by the constant custom of that country, the *filum aquæ* of the river of Severn was the common boundary of the manors on either side of the river.

When this state of the evidence was opened, it was insisted on, that the river in question was an arm of the sea, a royal river, and a member of the king's port, and therefore lay not *in prescription* to

be part of a manor. But the court overruled this exception, and admitted that even in such a river, though it be the king's in point of interest *prima facie*, yet it may be by prescription and usage, time out of mind, *parcel of a manor*.

Upon which the defendant proceeded to his proofs, and insisted upon many badges of ownership, as follow :

That the lords of the manors adjacent to this river, and particularly those of that manor, had all *royal fish* taken in the river, opposite to their manor, *usque filum aquæ*.

That they had the sole right of salmon fishing.

That they had all wrecks cast between high and low-water marks.

That the lords of the manors adjacent had ancient fishing places, and wears within the very channel.

That they had from time to time granted these fishing places by lease, &c. ; and that they were constantly enjoyed and rent paid by the lease holders.

That by common tradition and reputation, the manors on either side of the Severn were bounded one against another, by the *filum aquæ*.

That the increases happening by the reliction of the river, were constantly enjoyed by the lords adjacent.

The above facts being effectually established, the court and the king's attorney-general, and the rest

of the king's counsel, were so well satisfied with the defendant's title, that they moved the defendant to consent to withdraw a juror, to which he agreed, and thus the matter rested.

This important and solemn trial for the right to a royal river, in a port and part of it, fully proves what has been laid down, viz. that it may be acquired as private property by usage.

There is a *limit*, however, to the interest which may be created in salt and tide waters by usage. The civilians say with truth, *nihil præscribitur nisi quod possidetis* : nothing can be claimed by prescription, unless it can be possessed. An individual, therefore, cannot acquire by prescription any more of the sea, than he can reasonably possess. And those parts of the sea, which may require a naval force to protect them, do not lie within the extent of private acquisition or possession.¹

But although an individual may have the property of an arm of the sea, &c. by the means and to the extent above mentioned, yet the sovereign must, of course, be supposed to have the right of empire or government over it. The people also retain the *jus publicum* of passing and repassing with every kind of water-craft, and may therefore remove all obstructions to the navigation. For the *jus privatum* of the owner or proprietor is subject to the *jus pub-*

¹ Hale, *De Jure Maris*, Harg. Tracts, 32.

licum to which the community are entitled, in the same manner as the soil of an highway; that is, although it is the freehold of an individual, yet it is controlled by a right of passage which must not be prejudiced.¹

In *Chad v. Tilsed*, before cited, wherein it was held, that an embankment across a *bay* continued for forty years was evidence of a prescriptive right, it was said by Park, J., that there was nothing in the decision in conflict with that in *Vooght v. Winch*, in which case it was held, that twenty years' enjoyment of a river which is a *public highway* created no right adverse to the public.² The doctrine seems to be, that no time will sanction a public nuisance to navigation without the express sanction of the legislature;³ and that no laches can be imputed to the government;⁴ unless an enjoyment at least strictly immemorial be shown. In action of trespass for cutting down and removing a bridge over a navigable arm of the sea, alleged to be the property of the plaintiff, which bridge had been standing upwards of *fifty years*, the court in giving their opinion observed, — "Public rights cannot be destroyed by long continued encroachment; at least the party

¹ Hale, *De Jure Maris*, Harg. Tracts, 36. And see *ante*, Chap. IV. p. 80 - 87.

² *Vooght v. Winch*, 2 B. & Ald. R. 662.

³ See *ante*, Chap. IV. on the Public Right of Navigation.

⁴ *Stoughton (Town of) v. Baker*, 4 Mass. R. 522.

who claims the exercise of any right inconsistent with the free enjoyment of a public easement or privilege, must put himself on the ground of *prescription*; unless he has a grant or some valid authority from the government; and a right by prescription does *not* exist in the present case.”¹

¹ *Arundel (In. of) v. McCulloch*, 10 Mass. R. 70. And see *Johnson v. Irwin*, 3 S. & Rawle (Penn.) R. 292.

CHAPTER X.

OF WRECK.

CONNECTIVELY with the rights to the shore which have been considered in the preceding pages, it may perhaps be proper to consider the subject of *wreck*, which is where any vessel is lost at sea and the cargo is thrown upon the land, and which by the ancient common law was considered to belong to the king.¹

To constitute a *legal wreck*, it is to be observed, the goods must have *come to land*. If they continue at sea, they were distinguished by the barbarous names *jetsam*, *flotsam* and *ligan*. *Jetsam* is where goods are cast into the sea and there sink and remain under water; *flotsam* is where they continue to swim on the surface of the sea; and *ligan* is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. These, by the common law, are also the king's, if no owner appears to claim them; but if an owner appears, he is entitled to the possession. For if they are thrown overboard in order to lighten the ship, without any mark or buoy, the owner is not by this act of necessity

¹ 1 Black. Com. 283, 292.

construed to have renounced his property.¹ And agreeably to this was the Roman law, *Quæ enim res in tempestate, levandæ navis causa, ejiciuntur, hæ dominorum permannet. Quia palam est, eas non eo animo ejici, quod quis habere nolit.*² Each of these three is considered so distinct from wreck, that by the king's grant of wrecks, things *jetsam*, *flotsam* and *ligan* will not pass.³

The laws which have been made upon the subject of wreck, have, in modern times, been influenced by a spirit the reverse of that exhibited by the savage customs which formerly prevailed among the northern nations of Europe, (and particularly on the shores of the Baltic,) permitting the inhabitants to seize on all the wrecked property they could find, as lawful prize. The inhuman *Drois de Bris sur le Naufrages*, was in barbarous ages very generally, and rigidly enforced in Europe, and especially among the Gauls. In those days every stranger was treated as an enemy, and was not only robbed of his goods when in the distress of shipwreck, but was fortunate if he escaped the hand of the murderer.⁴ As it is expressed by an ancient author, *in naufragorum miseria et calamitate tanquam vultures ad prædam currere.*⁵

¹ Sir Henry Constable's case, 5 Rep. 108 ; 1 Bl. Com. 202 ; Harg. Tracts 41.

² Inst. L. 2, t. 1, s. 48.

³ 5 Rep. 108.

⁴ Sea Laws. 153.

⁵ See 1 Bl. Com. 283.

The common law, as laid down by Blackstone, that goods wrecked were adjudged to belong to the king, and the property in them was lost to the owner, he admits, was not consonant to reason and humanity. It is no more than fair to presume, that the king's ancient prerogative of wreck was founded on the general principle of policy and convenience. If every person was permitted to carry away what he found upon the seashore, the owner would be exposed to the danger of losing his property therein. For the benefit of the owner, therefore, it was just and proper, that the property should be consigned to the proper officer of the crown, by whom it was preserved, and if the rightful claimant did not appear in a reasonable time, it was proper that it should be applied to the augmentation of the public revenue.

It was ordained by king Hen. I. that if any *person* escape alive out of the vessel, it should be no wreck.¹ Afterwards, king Henry II. by charter, declared, if on the coasts of either England, Poicton, Oleron or Gascony, any ship should be distressed, and either man or *beast* should escape, or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king or other lord of the franchise.²

¹ 1 Bl. Com. 290; Harg. Tracts, 37, 38.

² Ib. 1 Rym. Fœd. 36.

The charter of Henry II. was confirmed with improvements by Richard I.; who, in the second year of his reign, not only established the concessions of this charter, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also, that if he perished, *his children*, or in default of them, *his brethren and sisters* might retain the property. And in default of brother or sister, then the goods should remain to the king.¹ It was in like manner that Constantine the great, finding that by the imperial law the revenue of wrecks was given to the princes' treasury, or *fiscus*, restrained it by an edict, and ordered them to remain to the owners, adding the humane expostulation, "*quod enim jus habet fiscus in aliena calamitate, ut de re tam luctuosa compendium sectetur*." ² Bracton, who was acquainted with the edict of Constantine, lays down the doctrine of wreck upon like equitable principles, for if not only a *dog*, for example, escaped, by which the owner might be discovered, but if by any *certain mark* was set on the goods, as evidence of the owner, it was no wreck.³

By the statute of *West. I. 3 Ed. I. ch. 4*, the time of limitation of claims given by the charter of *Hen. II.* (three months) is extended to a *year and a day*;

¹ 1 Bl. Com. 291; Harg. Tracts, 40.

² Code, 11, 5, 1.

³ Bract. L. 3, 120, s. 5.

and it enacts, that if a *man*, a *dog*, or a *cat* escape alive, the vessel shall not be adjudged a wreck. The animals mentioned are only put for examples. Whether the real owner was entitled to reclaim his shipwrecked goods, although *no* living creature had come alive from the ship to the shore, was a question which arose in the King's Bench in *Hamilton v. Davis*.¹ The grantee, under the crown, claimed the goods as wreck, because the ship was totally lost, and no living animal was saved, and his counsel insisted, that, according to all the writers, from the *Mirror* to *Blackstone* inclusive, it was a lawful wreck, as no living creature had come to the shore, and that *Bracton* stood unsupported by any other writer. But Lord Mansfield, "with a sagacity and spirit that did him infinite honor,"² reprobated the doctrine urged by the counsel, and declared that there was *no case* adjudging, that the goods were forfeited, because no dog, or cat, or other animal, came alive to the shore; that any such determination would be contrary to the principles of law and justice; that the very idea was shocking; and that the coming ashore of a dog, or a cat, alive, was no better proof of ownership, than if they had come

¹ *Hamilton v. Davis*, 5 Burr. R. 2732. In case the goods are of a perishable nature, the sheriff may sell them, and the money received for the same, may be claimed by the owner in their stead. *Molloy*, 263.

² 2 Kent's Com. 322.

ashore dead ; that the whole inquiry was a question of ownership ; and that, if no owner could be discovered, the goods belonged to the king, and not otherwise ; and that the statute of 3 Ed. I. was not to receive any construction contrary to the plain principles of justice and humanity.

Though the governments of the American colonies were understood to be exclusive of many royal prerogatives, yet the king considered himself as entitled to wreck. This is made to appear by the grant to Sir Ferdinando Gorges, of the province of Maine, in 1639, which grant includes the right to wreck. And as the king judged he could grant this right in one colony, he of course so judged, as relates to the other colonies.¹ If the king's prerogative of wreck, then, extended to the colonies, and was not relinquished to the colonies, (as for instance, his prerogative in royal fish was relinquished to Rhode Island,) the colonies must have succeeded thereto, on the separation of the two countries, when they became independent states.

The statutes of New York, Massachusetts, and other American states, are like the edict of Constantine, and the declaration of Bracton ; as they declare, that nothing that shall be cast by the sea upon the land, shall be adjudged wreck, but the goods shall be kept safely for the space of a year for the true owner, to

¹ 3 Dane's Abr. 137.

whom the same is to be delivered on his paying reasonable *salvage*; and if the goods be not reclaimed within that time, they shall be sold, and the proceeds accounted for to the state.¹ The statutes of North Carolina on the subject, are founded, said Mr. J. Story, on the principles of justice and humanity.²

¹ 2 Kent, Com. 321, 322; N. Y. Rev. Stat. vol. 1, p. 690; Mass. Rev. Stat. part 1, tit. 14, ch. 37, sec. 12.

² 5 Mason's R. 477.

APPENDIX.

APPENDIX.

SELECT ADJUDGED CASES.

BLUNDELL v. CATTERALL.

(5 B. & Ald. R. 268; S. C. 7 Eng. C. Law R. 91.)

TRESPASS, for breaking and entering the plaintiff's close, (describing it, first, as a close called the Sea-Shore, within the manor of Great Crosby; secondly, as a close between the high-water mark and the low-water mark of the river Mersey, in Great Crosby, in the county of Lancaster;) and with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and soil of the said close. The defendant pleaded, as to the trespasses committed on the close called the Sea-Shore, and on that between the high and low-water mark, a public right of way on foot, and with cattle, carts, and carriages; and secondly, as to the same trespasses, that all the liege subjects of our lord the king, had been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the right and liberty of bathing in the sea from time to time, being over and upon the whole or any part of, or adjoining to, the said close, in which, &c., at all seasonable and convenient times, for their health and recreation, and for that purpose, of going and returning, passing, and repassing into, through, over, and along the said close, in which, &c. on foot, and with their servants, and with carriages and bathing ma-

chines, and horses drawing the same to the sea and back again ; and of staying in and upon the close a necessary and convenient time for the purposes of bathing as aforesaid ; And thirdly, as to part of those trespasses, a right of bathing and of passing on foot only. The plaintiff took issue on these pleas ; and also newly assigned that the defendant committed the trespasses on other occasions, and for other purposes than those in the pleas mentioned, and out of the highway in the first set of pleas mentioned. Issue thereon. At the trial, at the last Lancaster assizes, before Bayley J., a verdict was found for the defendant on the first set of pleas ; and for the plaintiff on the new assignment, and on all the other pleas, subject to the opinion of the Court on a special case. The plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing thereon with stake nets. The defendant was the servant at an hotel, erected in 1815, upon land in Great Crosby, fronting the shore, and bounded by the high water mark of the river Mersey, the proprietors of which kept bathing machines for the use of persons resorting thither, who were driven by the defendant, in machines, across the shore into the sea, for the purpose of bathing, and the defendant received a sum of money from the individuals so bathing, for the use of the machines, and for his service and assistance. No bathing machines were ever used upon the shore in Great Crosby, before the establishment of this hotel, but it had been the custom for the public to cross it on foot, for the purpose of bathing. There was a common highway for carriages along the shore, and it was proved, that various articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal, made about forty years ago. The defendant contended for a common law right for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages. The case was argued in last Easter term.

Gregson, for the plaintiff, contended, that there was no common law right to bathe, independently of usage in the particular place ; first, from the silence of the authorities ; secondly, because such a right was contrary to analogies ; and, thirdly, because it was contrary to established and acknowledged rights. As to the first point, it is sufficient to refer to Lord Hale's treatise *De Jure Maris* and *De Portibus Maris*, where, in chapters 5 and 6, he enumerates the different public and private rights applicable to the sea-shore, and creeks and arms of the sea, and does not include this right. As to the second, it is laid down in Lord Hale, *De Portibus Maris*, pp. 73 and 76, and in Morgan's case, p. 51 of the same book, that the public have no right to unlade goods, or to moor or tow their vessels on the shore, without leave. The authority of Bracton, lib. i. c. 12, s. 6, cannot have much weight, for it is only copied from the civil law, and was overruled in *Ball v. Herbert*.¹ As to the third point, it is clear that such a right would interfere with the improvement of the shore by the lord ; and that this right is in the lord appears from Sir Henry Constable's case, 5 Rep. 107 ; *Hammond v. Digges*, Dyer, 326 ; *The Attorney General v. Roll and Others*, cited Hale, p. 27 ; *Stockwell v. Terry*, 1 Ves. sen. 115 ; and *Warwick v. Collins*, 2 M. & S. 361.² So, all wharfs, quays &c. erected on the shore, might be pulled down ; for no length of time can legalize a nuisance, which these would be, if this right existed. *Vooght v. Winch*, 2 Barn. & Ald. 662 ; *Rex v. Cross*, 3 Campb. 224.

Joy, contra. The case of *Ball v. Herbert* is very distinguishable from the present. That case only applied to the banks of a navigable river, which stand obviously on a different foundation from the sea-shore. On the banks of the river, where the right of towing was claimed, no general right of highway was con-

¹ 3 T. R. 261.

² The references are to Lord Hale's treatises, as published by Mr. Hargrave in his Law Tracts.

tended for; whereas, in the present case, the *locus in quo* is a public highway. The claim there made, if maintainable, would have established the right to tow on both sides of all navigable rivers, although this is contrary to general practice, and although most of the navigable rivers in the kingdom have been made so under different acts of parliament, passed subsequently to the lawful construction of dwelling-houses, &c. upon their banks. Whereas the barren sands of the sea-shore, covered by the sea every tide, are no where so appropriated. The fact, too, that such acts have been repeatedly passed to make rivers navigable, and to appoint towing-paths on their banks, within certain limits, shows that such paths did not previously exist at common law. An act of parliament was not considered necessary to render the open sea navigable, or its shores accessible. The distinction between navigable rivers and the sea-shore is frequently noticed by Lord Hale, pp. 6 and 7. This right is not contrary to analogies; for the public, generally speaking, have a right to fish on the coast, and on arms of the sea, and to cross its shores for that purpose, although that right may, in some few instances, have been interfered with, where individuals claim under a grant from the crown, or by prescription, which presupposes a grant. Lord Hale, pp. 11, 19, 20, and *Bagott v. Orr*.¹ The right to bathe in the sea is of great moment to the public, and less liable to private appropriation than the right of fishery. Although private individuals may possess advantages connected with the shore, still they cannot possess any which can authorize them to preclude the public from their permanent right of free passage over it. The erection of weirs, although in some instances tolerated under ancient grants, has been repeatedly treated and considered by the law as a nuisance, on the ground that they interfere with the public rights of fishery. In *Weld v. Hornby*,² the substitution of a stone wear for one of brush-wood, was held to be an illegal encroachment, because it prevented the ascent of fish up the river-

¹ 2 Bos. & Pull. 472.² 7 East, 195.

In *Bagott v. Orr*, the right of the public to pass freely over the sea-shore for any common use and enjoyment thereof, is fully recognized. The authority of Bracton is expressly in point, and fully establishes the position, that the sea-shore is as common to all as the sea itself; and as the sea is open to every one, it follows, that if the passage from Bracton be good law, that the shore is equally so. His authority, indeed, was questioned in *Ball v. Herbert*. Lord Hale, however, in his History of the Common Law, mentions Bracton as a good authority. He was Chief Justice of England in the reign of Hen. 3; and from his station, therefore, must be taken to be no mean authority of what the common law was in his day. The passage referred to, is cited by Lord Hale in his treatise, *De Portibus Maris*, c. 7, p. 83; and also in Callis on Sewers, p. 54. It is no objection to the passage, that Bracton has availed himself of the very words of Justinian. It was impossible, that he should not have found the principles there laid down in the civil law, or in any other well digested code, for they are directly derived from the law of nature, and are indispensable to the enjoyment of those common benefits which are most susceptible of private appropriation, and as such, are to be found in the written or unwritten law of all civilized nations. *Grotius De jure belli et pacis*, c. 2, ss. 3, and 4; and *Mare liberum*, *passim*. Lord Hale, c. 6, p. 78, is an authority to show a general right in the public to the free use of the shore for all lawful purposes. As to the third objection, that the right claimed in this case, is incompatible with acknowledged private rights, such as the erecting of wharfs, quays, and embankments, the right now claimed being the more ancient, the more general, and the more important of the two, is paramount. Besides, this general freedom of passage over the shore is not incompatible with the occasional construction of quays or wharfs. They are rarely, in point of fact, so situated as to offer any real obstruction to persons crossing the shore for a lawful purpose, while they mainly contribute to another very material and equally lawful enjoyment of it, in the facilities afforded by them to the landing

and loading of goods, and such buildings are allowed from the necessity of the case, and for the public good, and are in no instance so entirely *juris privati* as not to be subject to public regulation, being affected with a public interest. And if they should be so situated, as instead of conducing to the better use of the shore, to become actual obstructions thereto, they may be abated as nuisances. Lord Hale, c. 7, *De Portibus Maris*, p. 85. Besides any argument derived from the difficulty of reconciling the erection of wharfs or embankments, with the general right to pass over the shore, for the purpose of bathing, must apply equally against the right to pass over it for the purpose of fishing, which latter is admitted to exist. It is clear, that the common law right to bathe exists, from the universal practice of the whole realm, which is a proof of what the common law is, the usage of a place being a custom, but that of the whole realm being the common law. The authority of Bracton is expressly in point, and establishes the position, that the sea-shore is as common to all as the sea itself. If so, then the absence of any authorities, shows that it remains the common law now; for it cannot be shown to have been since altered. The right to the shore was originally in the king, and when in his hands, was subject to this right. No subject claiming under him, can claim a greater right than the king had. As to the right to bathe from machines, it exists as an accessory to the general right, for many persons, from infirmity or other circumstances, might otherwise be deprived of this beneficial practice.

Cur. adv. vult.

And now, there being a difference of opinion, the Court delivered their judgments *seriatim*.

BEST, J. The question in this case is, whether there be a common law right to pass over the shore for the purpose of bathing in the sea. It will not be disputed that the sea, which has been called the "Great highway of the world," is common

to all. Bathing in the sea, if done with decency, is not only lawful, but proper, and often necessary for many of the inhabitants of this country. There must be the same right to cross the shore in order to bathe as for any other lawful purpose. We are, therefore, now to decide, whether the public are precluded from passing, except at particular places, over the beach to the sea without the consent of some lord of a manor. That this will be the consequence of our deciding in favor of the plaintiff, has been already admitted at the bar, and must be conceded by every one. I am fearful of the consequences of such a decision; and, much as I dislike differing from the rest of the Court, I have thought it my duty to declare that I cannot assent to it. We have been told that lords of manors will find it their interest to indulge the public with the privilege of going on or over the sands of the sea, and that judges and juries will check the vexatious exercise of the right to exclude them. But the free access to the sea is a privilege too important to Englishmen to be left dependent on the interest or caprice of any description of persons.

It is agreed by all, that the sea-shore was at first appropriated to the king, from whom the right to it must be derived. The present state of the shore shows the manner in which the crown must have used it. Some parts of it were held exclusively by the crown for the purposes of fisheries, harbors, warehouses, &c. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part has arisen the general rule, or common law right, and the state of the portions exclusively occupied has occasioned the exceptions. The claim of the public to a right of way over the beach stands on the general law, and a person who will dispute this public right in any particular part of it, must establish his right to do so by showing, first, that the king had an exclusive possession of such part, and that a right to such exclusive possession has been conveyed from the crown to such person. This has been the course

in which persons have proceeded who have attempted to show any exclusive right, either in arms of the sea or in the shore. In Lord Fitzwalter's case,¹ Lord Hale says, "An arm of the sea is *primâ facie* common to all, and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is *primâ facie* a good justification to say, that the *locus in quo* is *brachium maris*, in quo unusquisque subjectus dom. regis habet et habere debet liberam piscariam." So, in *Bagott v. Orr*,² the Court of Common Pleas held, "that if the plaintiff had it in his power to abridge the common law right of the subject to take sea-fish upon the shore within his manor, he should have replied that matter specially." The same doctrine is laid down in *Carter v. Murcot*.³ It may be observed, that in the case now under consideration it is expressly found, that the soil of the *locus in quo* is in the plaintiff; but I say the soil must be in the plaintiff, as it was in the king; for the grantee cannot have a greater interest than the grantor had. The king had the right of soil in the shore in general; but the public had a right of way over it, and the king's grantee can only have it, subject to the same right. In the treatise of *De Jure Maris*, p. 22, Lord Hale says, "The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use." If the owners of the soil must claim by prescription, can they establish an exclusive right? Did they ever possess an exclusive right? For, as Lord Hale says, the civilians tell us truly, "*Nihil præscribitur nisi quod possidetur*."⁴ As the king might have granted a right in particular parts of the shore, so, either he or his grantee of the soil of any part of the shore, may take the products of the shore, provided their removal does not impede the public right of way. The owner of the soil of the

¹ 1 Mod. 105.

² 2 Bos. & Pull. 479.

³ 4 Burr. 2162.

⁴ De jure Maris, p. 22.

shore may also erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it, than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and, whilst the tide is up, must somewhat narrow the passage of the river; yet, such wharfs are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other. The civil law, copying, in this respect, from the law of nations, allowed any one to build on the sea-shore (there being, under that law, no lords of manors to claim the soil), but imposed on the builders the condition that the law of England imposes on the owners of the soil, that is, that their buildings should not interrupt the right of way. Digest, l. 43, tit. 8, "*In littore jure gentium edificare liceret nisi usus publicus impediret.*"

The universal practice of England shows the right of way over the sea-shore to be a common law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of a manor has ever attempted to interrupt such persons. Goods could not be landed or loaded except at particular places, but this restraint was imposed by laws made for the protection of the revenue, and the security of the realm, and is not the consequence of any rights in the owners of the soil of the shore. Men have landed from boats, drawn their boats

on the sands during their stay on shore, and embarked again in their boats. Persons have at all times, at their pleasure, walked or ridden on the sands. Men have, from the earliest times, bathed in the sea ; and unless in places or at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them. So far from the law allowing lords of manors to restrain persons from bathing, it will give them every facility for this recreation. Bathing promotes health. By bathing, those who live near the sea are taught their first duty, namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the waves, and learn how to seize the proper moment for giving their assistance. It is found as a fact, in this case, that it has been the custom for the public to cross the spot in question on foot for the purpose of bathing. Bathing machines were used before my time, and I believe before that of the oldest person now alive, and I think the use of them is essential to the practice of bathing. Decency must prevent all females, and infirmity many men, from bathing, except from a machine. Attempts have been made to make those who use machines pay some acknowledgment to the lord of the manor where they were used ; but I cannot find that any of those attempts have yet succeeded. I shall presently show from authority, that the right to fish is only a part of the general right of the subjects of England. Persons have also crossed the beach for the purpose of fishing in the sea, and have brought back their fish over the beach, both on horses and in carriages. These acts of the fishermen are instances in support of the common law right of way.

The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law. Many of our most valuable common law rights have no other support than universal practice. In *Ball v. Herbert*,¹ Lord Kenyon says, "Common law rights are either to be found in the

¹ 3 T. R. 261.

opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." The instances put by me, sufficiently demonstrate the existence of an universal custom in favor of a public right of way over the sea-shore.

It has been at all times the policy of this country to encourage navigation. The free passage of the sea-shore is essential to the convenience and safety of navigation. Cases of immediate necessity or imminent danger may be said to form exceptions to general rules; but there are many cases in which there is neither immediate necessity nor imminent danger, in which boats must pass between ships at sea and the shore, letters and provisions must be sent, passengers require to land or to embark, intelligence necessary to the further prosecution of a voyage is desired, or a pilot is wanted. For many leagues of coast, there is no public passage marked out, by which persons may go to or from the sea. But fixed places will not do. Winds or currents make it necessary, that the greatest part of the shore should be left open for persons to land on, and embark from. There is no statute, or rule of common law, that secures the right of passage over the shore for purposes connected with navigation; those who have passed over the shore for those purposes, have been trespassers, if they were not justified under the general common law right of free passage. Is it to be supposed, that, in a country, the prosperity and independence of which depends on navigation, that which is so necessary to navigation as a road for all lawful purposes to the sea, should not have been secured to the public, particularly when it might be done without injury to the interest of any individual?

There is no clear and express declaration on this point, either in the statutes or in the common law. But this right is so important to the best interests of the country, that had not the constant exercise of it been considered sufficient to establish it, the legislature would no doubt have declared it to be in the people of England. Bracton, lib. 1, cap. 12, sec. 6, says, "*Publica vero*

sunt omnia flumina et portus. Idèdque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuiuslibet liberum est, sicut per ipsum fluvium navigare : sed proprietas earum illorum est quorum prediis adherent, et eàdem de causâ arbores in eisdem natæ eorundem sunt : et hæc intelligenda sunt de fluminibus perennibus, quia temporalia possunt, esse privata." This passage proves all that I am attempting to establish. It shows that all persons have a common right on rivers ; that the right of fishing exists only as a part of that common right, and that the banks of rivers are as much open to the use of the public as the rivers themselves. The passage has been supposed to prove too much, and therefore it has been said, that its authority cannot be relied on. Mr. Justice Buller, speaking of it, in *Ball v. Herbert*,¹ says, "that it plainly appears to have been taken from Justinian, and is only part of the civil law ; and whether or not it has been adopted by the common law, is to be seen by looking into our books ; and there it is not to be found." I admit that Bracton agrees with the civil law, and I must add, with the law of all civilized nations. Selden, who wrote his "*Mare clausum*," to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and in lib. 1, cap. 2, he has collected from the works of the learned of all nations, as well philosophers, divines, and poets, as lawyers, that the sea and its shores were common to all men, as much so as the air that blows over them. This I think proves, that the doctrine is reasonable, and ought to be adopted into our law, unless there be something in our particular situation to exclude it ; and so far from this being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law.

¹ 3 T. R. 263.

But our books show, that this passage has been adopted into our law. Mr. Justice Buller tells us, that Callis quotes it as English law, and I have often heard Lord Kenyon speak with great respect of that writer. Bracton has not stated this as civil law, he has made it part of his book, *De legibus et consuetudinibus Angliæ*. He was Chief Justice of England in the reign of Henry the Third; and Lord Hale (*Hist. of the Common Law*, ch. 7) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In Fortescue, p. 406, Lord Chief Justice Parker says, "As to the authority of Bracton, to be sure many things are now altered, but there is no color to say, that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. I do not say, that the whole of the passage in Bracton is now good law. It was all good law at the time he wrote, and all of it that is adapted to the present state of things is good law now. It is objected, that Bracton says, "that any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Undoubtedly the public cannot now pretend to claim this right in all navigable rivers. Many rivers have been rendered navigable since Bracton wrote, which in his time were private streams. The public have no greater right on the banks of such rivers, than the owners of the adjoining lands granted them when such rivers were made, from private streams, public rivers, and the extent of the grant must be ascertained from usage. This is the case with a new made road. If one dedicates to the public a right of way over his lands, the public must take the road with gates on such parts of it as the owner thinks proper to erect at the time he makes the dedication. But Bracton speaks not of newly made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their

waters. This I take to be the law with all inland navigations in the reign of Henry the Third. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual. On some rivers that have been navigable from time immemorial, the public using but one of the banks for a towing path, the other has been usefully occupied by the owner of the adjoining land, and so an exclusive right has been established to the parts so occupied. But the barrenness of the greatest part of the sea-shore has prevented it from becoming the subject of exclusive property. It is useful only as a boundary and an approach to the sea; and therefore ever has been, and ever should continue common to all who have occasion to resort to the sea. Thus, the case of *Ball v. Herbert* is distinguished from the present, and it must be recollected, that, in that case, Lord Kenyon said, "Some of the passages in Lord Hale which seem to favor the common law right, are rather applicable to banks of the sea, and to ports; and it is part of the king's prerogative to create ports, which was lately exercised at Liverpool." In Broke's Abridgment, tit. Customs, pl. 46, all the Judges agreed, "that fishermen may justify going on the land adjoining the sea, to fish in the sea; for this is for the good of the commonwealth, affording sustenance to many persons, and is the common law." If the right of fishing is only a part of that more general right for which I am contending, as appears from the passage in Bracton, and will appear from Lord Hale, then this is a decision in support of the general right.

The reason on which my judgment is grounded is public advantage. The right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing, and must have been as well secured to the subjects of this country by the common law. That the right of using the shore for the purpose of fishing does not depend on any particular law applicable to fishing only, but is part of the more general right of the subjects to the sea and its shores, is proved by Lord

Hale, putting the practice of fishing as evidence as the general right. In part 1, cap. 8, *De Jure Maris*, p. 11, he says, "The king's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally in these things that follow; first, the right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown." This makes the judgment in *Broke* bear directly on the point in dispute. Lord Hale, in his treatise *De Portibus Maris* (cap. 6, p. 73), says, "Before any port is legally settled, although the propriety of the soil of a creek or harbor may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbor; and there is also a common liberty for any to come thither with boats and vessels, as against all but the king. And, upon this account, though A. may have the propriety of a creek or harbor, or navigable river, yet the king may grant there the liberty of a port to B.; and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A.; for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any to pass in it, against all but the king, (for it was *publici juris*, as to that matter, before), so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unload." Here, we have the distinct authority of Lord Hale, that although a man has the soil under an arm of the sea, and the soil of the shore, yet the public have not only a right to navigate on the waters, but to *unload* on the shore; and that this right can only be restrained by the king's prerogative. If they have a right to unload, they must have the right to come over the shore; for the right to unload would otherwise be useless. The right on the shore is declared by this passage to be as common to the public as the right on the water: that the water is open to the public for all lawful purposes is not denied. What law, then, has narrowed the right of the public on the shore? Lord Hale then adds, "But if A. hath the ripa or bank of the port, the king may not grant a liberty to unlade

on that bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is ; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent. And, therefore, in the creation of a new port, either by proclamation or charter, it hath been the course to secure the interest in the shore beforehand, for the building of wharfs and keys, for the application of the merchandise, and for the building of houses of receipt." Lord Hale makes the distinction between the shore of the sea and the banks of a river, which Lord Kenyon points at in *Ball v. Herbert*; the former is free for all to come and unload, but the king cannot grant a liberty to unload in the latter, without the consent of the owner. I again repeat, that the shore is not free to unload from any particular law giving this freedom, but from the general right of passage over it, which the usage of the whole coast shows to have been reserved for the benefit of the public out of the grant of the soil by the crown. This is further proved to be the meaning of Lord Hale by the concluding words of this passage, in which he says it was usual to secure the interest of the shore, not for a way to the sea, but for the building wharfs, quays, and houses for the reception of goods. The right of way the public had, but the right of building was to be purchased. The cases of *Young v. ———*¹, and *The Queen v. The Inhabitants of Cluworth*,² are properly overruled by that of *Ball v. Herbert*; and I do not rely on those cases.

My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the king. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the king, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shows that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject;

¹ *Ld. Raym.* 725.

² *6 Mod.* 163.

what is to be found seems to favor the common law right of way. But unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold, on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In England, our ancestors put the public rights in rivers under the safeguard of *magna charta*. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors. It has been said, that lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are armed with authority to bring to punishment such as bathe indecently. I would rather rely on disinterested and responsible magistrates, than on an interested and irresponsible lord of a manor. A lord of a manor might remove bathers from a path within view of his own house, but would he be equally active to protect his neighbors from offence? If he is not, I know no mode of forcing him to execute the power he derives from his property. For these reasons, I am of opinion that the defendant is entitled to the judgment of the Court.

HOLROYD, J. The question put in this case for our opinion, is the general question, whether there is a common law right for all the king's subjects to bathe in the sea, and to pass over the sea-shore for that purpose, on foot and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common law right in all the king's subjects to do so in the *locus in quo*, though the soil of the sea-shore, and

an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial. The plaintiff being stated to be the owner of the soil of the shore, and to have the exclusive right of fishing thereon, with stake nets, as lord of the manor, the soil, as parcel of, or belonging to the manor, must, according to 2 Bl. Com. 92, have been so from before the time of passing the statute, *Quia Emptores Terrarum*, *tempore* Edw. 1; since which time no manor can have been created; and the plaintiff being stated to have the exclusive right of fishing, as lord of the manor, this can only be as appendant or appurtenant to the manor. It must, therefore, be by prescription, and consequently there has been an exclusive right of fishing there from time immemorial. The question, too, is, as to the public right to the extent above stated, independently of usage and custom. The right is claimed on the pleadings, as founded not on usage or custom, but upon the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the sea-shore on foot only, for the purpose of bathing, no bathing machines having ever been used in Great Crosby, where the *locus in quo* is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals, or by either the permanent or temporary inhabitants of any vill, parish, or district.

The claim upon the pleadings, respecting the public highway along the shore, and the verdict, and facts found in the special case respecting the same, make no difference, but leave the question, with respect to the right of bathing, and the right incident thereto (if any) of passing over the sea-shore for that purpose, on foot and with horses and carriages, the same as if no such claim of a general public highway existed, or was put upon the record, as the jury have found a verdict for the plaintiff upon the new assignment, that the trespasses complained of were com-

mitted in the *locus in quo* on other occasions, and for other purposes than as a general public highway and out of the highway there.

It was contended in argument at the bar, that, by the common law of England, all the king's subjects had a right, not only to traverse the ocean itself in every direction, as well for commerce, trade, and intercourse, as for every other lawful purpose; but, also, that they had a general public right of way over the sea-shore to and from the sea, and that they had it, as well during the recess as during the flux of the tide, for all lawful purposes; and that the king could not grant the shore so as to supersede or to deprive the public of the exercise of that right over the sea-shore. And it was further contended, that even if the public right was not so extensive, yet that, at all events, the king's subjects had a right of bathing on the sea-shore, so that it be exercised in such a way as is conformable to decency; and that they had also, as incident thereto, a right to pass over the sea-shore, not merely on foot, but with horses and carriages; that is to say, with bathing machines for that purpose, whether the sea-shore belonged to the king as public property, or to any individual as being now or even immemorially private property; and that such public right could not be superseded by the king's grant of the sea-shore as private property. And the earliest authority cited for this purpose was from Bracton, who copied it from the civil law. But whatever may be found to be the civil law upon this subject, and whatever may have been stated by some of our law writers from the civil law, or may be found to have dropped as dicta from some of our judges; yet it appears, I think, that the civil law, as applicable to this subject, differs from the common law of England; that its principles have not only not been adopted into the common law, but are at variance with it, and are therefore no guide to us; that the public right, to the extent claimed in this case, is not only not found to be established by our law, but that the established principles of our law are inconsistent with it. The question is with regard to the shore; that is

to say, the land between the high and the low water-mark, and, according to Lord Hale's definition of the sea-shore, between those marks at ordinary tides, that is to say, between the ordinary flux and reflux of the sea.

In Bracton, l. 1, c. 12, s. 6, it is thus laid down: "*Publica vero sunt omnia flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in eis reponere, cuius liberum est, sicut per ipsum fluvium navigare; sed proprietas earum, illorum est, quorum prædiis adherent et eadem de causâ arbores in eisdem natæ eorundem sunt. Sed hæc intelligenda sunt, de fluminibus perennibus; quia temporalia possunt esse privata.*" This passage is quite general, and is not confined to tide or navigable rivers. The doctrine as to the banks of rivers, is contrary to the case of *Ball v. Herbert*¹ respecting the right of towing paths, where Lord Kenyon says, "That there is such a custom on most of the navigable rivers, no person doubts, but still the right was founded solely on the custom." And there the Court determined against the general common law right claimed. It is, indeed, supported by the dicta of Lord Holt, in *Young v. ———*², and *Rex v. Cluworth*,³ in the former of which cases he ruled, "that every man, of common right, may justify the going of his servants or his horses upon the banks of navigable rivers, for towing barges, to whomsoever the right of the soil belongs:" and in the latter, "that if one has land adjoining on a common river, every one that uses that river, has, if occasion be, a right to a way by brink of water over that land, or further in if necessary." But both these authorities were cited and commented on in the case of *Ball v. Herbert*, and expressly overruled by the Court. The passage in Bracton is taken from Justinian, Inst. lib. 2, tit. 1, ss. 2 and 4; and is in his very words, except with the addition of the last sentence.

¹ 3 T. R. 261.

² 3 T. R. 261.

³ 1 Ld. Raym. 725; 6 Mod. 163.

But besides the difference between our law and the civil law, in regard to what is even there laid down by Bracton, the variance between the common law and the civil law in other respects, as to marine properties and rights, shows, that the civil law cannot be any guide, or afford any illustration to us in these matters; and therefore, though Justinian in s. 1, of that book and title, says, "*Nemo igitur ad littus maris accedere prohibetur*;" yet his doctrine cannot have any weight or authority in that respect with us, unless it be found to be confirmed or adopted by our own lawyers, and particularly, if it be found not to be consistent with, and conformable to the doctrines and principles of the common law. That there is this great difference between the civil and the common law, will appear from stating what is laid down in Justinian, in some of the other sections of that book and title, and comparing it with what is undoubtedly the common law, as to that species of property. In Justinian, the shore is thus defined, "*Est autem litus maris quatenus hybernus fluctus maximus excurrit*." By the common law, we know it is confined to the flux and reflux of the sea at ordinary tides. In Justinian, this is laid down, *De usu et proprietate littorum*, s. 5, "*Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris; et ob id cuilibet liberum est casam ibi ponere in quam se recipiat, sicut retia siccare, et ex mari deducere: Proprietas autem eorum potest intelligi nullius esse, sed ejusdem juris esse, cujus et mare, et quæ subjacet mari terra vel arena*." By the common law, no such right exists in the public of erecting on the sea-shore any building for drying their nets; and instead of the property in the shore being in no one, it is *primâ facie* in the king, and may be in a subject; and so may even an arm of the sea, a *districtus maris*, as Hale, *De Jure Maris*, p. 31, says, "a place in the sea between such points, or a particular part contiguous to the shore, or a port, or creek, or arm of the sea;" though, as he also there lays it down, in the main sea itself, adjacent to his dominions, the king only hath the propriety, but a subject hath not, and indeed cannot have that property in the sea through the

whole tract of it, that the king hath, because, without a regular power, he cannot possibly possess it. So by the civil law, s. 18, "*Lapilli et gemmae et cetera quae in littore maris inveniuntur jure naturali statim inventoris sunt.*" By our law, we know that wrecks and things found upon the sea-shore do not belong to the finder, but, where the owner cannot be discovered, to the king or his grantee, or to some person by prescription, which presupposes such grant. So by the civil law, s. 22, "*Insula quae in mari est, quod raro accidit, (here he is speaking of an island newly rising from the sea,) occupantis fit; nullius enim esse creditur.*" Lord Hale, *De Jure Maris*, p. 36, shows how the common law differs from this, "As touching islands arising in the sea, or in the arms, or creeks, or havens thereof, the same rule holds which is before observed, touching acquests, by the reliction or recess of the sea, or such arms, or creeks thereof. Of common right and *primâ facie*, it is true, they belong to the crown; but where the interest of such *districtus maris*, or arm of the sea, or creek, or haven, doth, in point of propriety, belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject, according to the limits and extents of such propriety."

By the common law, all the king's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers; and they have also, *primâ facie*, a common of fishery there; but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by Lord Hale; but whatever further rights, if any, they may have in the sea, or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore, (that is to say, between the high and low water-mark), when it is not sea, or covered with water, and especially when it has from time imme-

morial been, or has since become private property. For the purpose of the king's subjects getting upon the sea, and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord Hale the *Ostia Regni*; but also public places for embarking and landing themselves and their goods. It was not by the common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, nor fish or land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof, who, Lord Hale says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll; because, for so doing, it appears in Lord Hale's Treatise *De Portibus Maris*, p. 51, that one Morgan was fined 100 marks. No such amends could be taken, if there was a public right of coming there for that purpose in particular, or for purposes in general. In a case of necessity (as Lord Hale, in his Treatise *De Portibus Maris*, p. 53, says) either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. And he then further says, "In case of necessity, and for the supply of fishermen, all places were to that purpose and end ports:" that is, for the purpose of finding provisions for ships and mariners. This is not consistent with the general right contended for, as being in the public, of coming on the shore for their purposes in general as and when they please. It is said, indeed, in Fitzh. Barre, 93, which cites 8 Ed. 4, 19, "*Nota* by Danby,¹ That the fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishery is for the common wealth, and for the sustenance of all the kingdom; wherefore this

¹ A Puisne Judge of C. P.

is the common law, which was granted, &c." But in Bro. Abr., Customs, 46, the same case is more fully stated, where the doctrine appears to have been laid down on a question which arose upon a custom. That was trespass for digging land; and the defendant pleaded, that it was four acres adjoining to the sea, and that all the men of Kent, from time immemorial, have used, when they have fished in the sea, to dig in the land adjoining and pitch stakes for hanging their nets to dry. Nele.¹ He ought to show what men. Choke² and Littleton.³ This is not the custom, for it is against common right and reason. Danby.⁴ Fishers may justify going upon the land to fish, for this is commonwealth, and for the sustenance of man, and is the common law, which was granted. Fairfax.⁵ "Digging is destruction of the inheritance, therefore it is not a custom, &c." But this appears more fully still by recurring to the Year-book itself, and lord Hale, *De Portibus Maris*, 86, treats it as arising upon a custom; for he there says, "Look at the book of 8 Ed. 4, 18, for the Custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men." The case, as stated in the Year-books, 8 Ed. 4, 18, 19, after stating the pleadings as in Broke, proceeds as follows: Nele. He hath said that the men have used, &c., and this is not a good prescription, being, he ought to show who, &c. Choke. This custom cannot be good; for it is against common right to prescribe to dig in my land; but there are other customs, which are used throughout the whole land, and such customs are lawful; as of innkeepers, &c. and also a neighbor negligently keeping his fire, &c., and such customs are good, &c. Littleton. A custom which runs through the whole land is the common law, as the cases that you have put are, &c.; and, Sir, such custom, which may stand with reason, shall be suffered, as in the case where the younger son ought to inherit; for there is a reason for this, &c. But this custom is against reason; for if

¹ Counsel.

⁴ J. of C. P.

² C. J. of C. P.

⁵ Counsel.

³ J. of C. P.

he may dig in one place, he may dig in another place; and so, if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable. Danby. Those who are fishers in the sea may justify their going on the land adjoining to the sea; for such fishery is for the commonwealth, and for the sustenance of all the realm, &c.; wherefore this is common law, *quod fuit concessum*. (This, it may be observed, as far as it extends to the land above high water-mark, is contrary to *Ball v. Herbert*, unless where it is founded on custom. Such a custom may be good where a right to dig is not claimed, or the doing so may be justified under such circumstances as I shall afterwards state from Lord Hale.) Choke. If I have land adjoining to the sea, so that the sea ebbs and flows on my land, when it flows, every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right, &c.; and, Sir, when the sea is ebbcd, then in this land, which was flowed before, peradventure he may justify his digging, &c.; for this land is of no great profit to me, &c. It, therefore, clearly appears that this case proceeded entirely upon a particular custom, and the doctrine laid down by Choke, C. J. may be true, where there is such a custom; and such custom, confined to the sea-shore, may perhaps be good; but, if founded solely on the common law, is inconsistent with many passages in Lord Hale. By the common law, though the shore, that is to say, the soil betwixt the ordinary flux and reflux of the tide, as well as the sea itself, belongs to the king; yet it is true that the same are also *prima facie publici juris*, or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right in all the king's subjects, of navigation for the purposes of commerce, trade, and intercourse; and also the liberty of fishing in the sea or the creeks or arms thereof, which Lord Hale, *De Jure Maris*, p. 11, says, the common people of England have regularly, as a public common of pischary, and which, he says, they may not, without injury to their right, be restrained of, un-

less in such places, creeks, or navigable rivers where either the king or some particular subject has granted a propriety, exclusive of that common liberty. Neither in Lord Hale's treatise, nor elsewhere, does it appear that there is a common law right in the king's subjects in general, or any of them, to appropriate the sea-shore, or the soil even below the low water-mark, for general purposes, though temporary only, to their own use, without the king's grant or license, even where that can be done without nuisance to his subjects. Such an appropriation by any of the king's subjects, without his grant or license, though it were not in law a nuisance, would be (see Lord Hale, *De Portibus Maris*, 85), where the soil remains the king's, a purpresture, an enroachment, and intrusion upon the king's soil, which he may either demolish or seize, or arent, at his pleasure; and though it were even by building below the low water-mark, it would not, as Lord Hale there says, be *ipso facto* a common nuisance, unless it be a damage to the port or navigation; but where it is a common nuisance, as he also there says, even the king himself cannot license it. This shows that by the common law the king's subjects have not a general right of using or appropriating the soil of the sea-shore, or of the sea itself, as they please, even where the soil remains the king's, clothed with the *jus publicum*, and where that use or appropriation is effected in such a manner as not to be a nuisance to the public right of others.

But, further, such a general public right in all the king's subjects, to use the sea-shore for all such temporary purposes as they please, would be, I think, inconsistent with the nature of permanent private property, or with the sea-shore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the sea-shore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea, and the shore, for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the

fact of the *locus in quo* being private property, and of the fishing therein being also a private exclusive right, as stated in the case. And if the right of bathing, and of the incident foot and carriage way claimed for that purpose, cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing, and of a carriage way, as incident thereto; for to that extent it must be established, in order to entitle the defendant to the judgment of the Court. And then, I ask, where is such a right of bathing on the sea-shore, where it has become private property, and may immemorially have been so, and of a carriage way for that purpose as incident thereto, when sought for, to be found as existing at the common law, independently of usage and custom; a right too which is here claimed beyond the extent of the usage actually found in the case? Where the soil remains the king's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the king, the *parens patriæ*. Where there is, and has hitherto been, a necessity, or even urgency, for such a right, it must, or most probably will have, usage and custom in the place to support, regulate, limit, and modify it; for, whenever there has been a necessity for it, there, as far as such necessity has existed, some usage must have prevailed.

In *Ball v. Herbert*,¹ Lord Kenyon, in speaking of common law rights, says, "Common law rights are either to be found in the opinions of lawyers delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." And Ashhurst, J. says, "It seems extraordinary (if there be any such right) that it is not defined with greater certainty in any of our law books; for it is a right that in its nature must, if it existed, be subject to some restrictions, as, that it should be exer-

¹ 3 T. R. 261.

cised only on one, and that the most convenient side of the river ; for it would, in many instances, be a very oppressive right, if it could be claimed on both sides." And Buller, J. says, " This being claimed as a common law right, it can only be proved to exist by one of the means mentioned by my lord, as to general usage throughout the kingdom, of which the Court is obliged to take notice. That clearly does not exist. Then the question is, whether in our books, or on records, that right is established for which the defendant contends. The case in Lord Raymond is a very loose and inaccurate note. Another authority cited is a passage in Bracton, and quoted by Callis : that plainly appears to have been taken from Justinian, and is only part of the civil law ; and whether or not that has been adopted by the common law, is to be seen by looking into our books, and there it is not to be found." The present claim, to the extent to which it is necessary to establish it on the part of the defendant, is not, therefore, as it appears to me, supported either by necessity, by general usage of the realm, which forms the common law, or by special usage in the particular place ; nor is it to be found in our law books ; nor, if it were, would it follow that it was such a common law right as might not, by prescription at least, be otherwise appropriated. That general common law rights are frequently so appropriated, we all know to be the fact ; and that this may lawfully be established, by prescription at least, will appear from authority. The public common law rights, too, with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea-shore, when covered with water ; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea-shore, or the land adjoining thereto, except in case of peril or necessity. In *Carter v. Murcott*, (4 Burr. 2162,) Yates, J. (speak-

ing of a prescription for a several fishery, claimed in a navigable river), says, "Such a right may be proved. By the law of England, what is otherwise common may, by prescription, be appropriated. Grotius owns that navigable rivers may be appropriated. The case of The Royal Salmon Fishery in the River Banne, in Sir John Davies' Reports, is agreeable to this; and it is a very good case."

Many passages in Lord Hale's Treatises are inconsistent with the existence of such a general right of bathing, and of a passage over the shore with carriages, at common law, as is here claimed, and show that whatever the general public rights are, that they are only such as are upon and in the water, and not upon the dry land, unless in places sanctioned by usage, whether they be parts of the shore or not; at least, that they exist not upon the land, when not covered with water, where it has become private property, and, more especially, where it has immemorially been private or special property. I shall state a few of those passages. It appears from Lord Hale, that the king may license the erecting of quays, or other buildings, on the sea coasts, even below the low water-mark, where they are not in fact annoyances or nuisances, Hale, *De Portibus Maris*, 85; so wears, Hale, 22, *De Jure Maris*. As to the making of ports, and the three-fold right therein, especially the right of an individual subject, by charter or prescription, in a port, and previously in a creek or haven, particularly in bringing in his own goods, where he is owner of the soil, Hale, 72, 73. As to the owner's right to improve the shore, it is laid down that the king cannot grant a right to lade or unlade on the ripa or bank, without the owner's consent; there cannot therefore be any common law right to lade or unlade on the quay or shore, or land adjacent in the port, Hale, 51, 76. Evidence to prove the shore parcel of a manor, &c., disproves the general right of all the king's subjects on the shore, at least when and where it is not covered with water. So, as to having the right of royal fish and wreck, it is a great presumption that the shore is part of the manor, or otherwise he could not

have them, Hale, 26, 27. Now, this would not be the case, if the king's subjects had a prior general right to come when they pleased upon the shore. These passages from Lord Hale appear to me to be inconsistent with the general right contended for, independently of custom, for all the king's subjects to come as and when they please upon the shore, particularly where it has been either from time immemorial, or where it has since become private or special property, especially where it is not covered with the tide or water. Lord Hale notices and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein either at the public places appointed, or by usage established for those purposes, or with consent, upon the land, either of the king or of individuals, but no further. This right of bathing, and of a carriage way, as incident thereto, is no where noticed; and it does not, I think, exist by the common law upon the *locus in quo*, the private property of the plaintiff, unsupported as it is by usage and custom. I am, therefore, of opinion, in this case, that the plaintiff is entitled to the judgment of the Court.

BAYLEY, J. The question in this case is, whether there is a common law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose, upon foot, and with horses and carriages, notwithstanding the part on which the right is claimed, is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake nets, and of driving these stakes into the soil, that they may support the nets. And I am of opinion, that there is no such common law right. By the sea-shore, I understand the space between the ordinary high and low water-mark, and the property in this is *primâ facie*, in the king. It may, indeed, by grant or prescription belong to a subject, but until the contrary is shown, the presumption is, that it belongs to the king. Many of the king's rights are, to a certain extent, for the benefit

of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the king can make no modern grants in derogation of those rights. I have mentioned the rights of navigation and of fishing, because I can find no trace of such a right as that now claimed recognized in any of our books. It is material to distinguish between the different descriptions of rights; and the public may have a right of navigation, which is for the general benefit of all the kingdom; and a right of fishing, which tends to the sustenance and beneficial employment of individuals; but it does not thence follow that they have also the right of bathing. The existence or the extent of the subject's right is to be collected in this, as in other instances, from the manner in which the sea-shores throughout the kingdom have from time immemorial been used, and from legal authorities upon the subject. The right, as claimed, is not confined to any particular place, if it exists at all, but it must exist upon every part of the sea-shore. Every private building, then, erected upon the sea-shore, and even wharfs and quays, would be an obstruction to that right, and, of consequence, abateable or indictable. And yet, in how many instances are such buildings, wharfs, and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right, and be a nuisance, and so would the erection of stakes for holding nets; and yet, how frequently are such embankments made, and such stakes set up? A distinction has, indeed, been contended for between wharfs and quays, and other erections for public benefit, and for the interests of trade and commerce, and erections for private purposes; but in how many instances are there buildings for private purposes on the sea-shore? Where an erection is made on the sea-shore without authority, the crown may treat it as a purpresture, and prosecute it accordingly; but it has never yet been held abateable or indictable, because it happens to interfere with a supposed common law right of bathing. Indeed, this is the first time, as

far as I can learn, that such a right was ever stated upon any pleadings, or contended for in any court of law; and the inconveniences which would result from such a right, afford to my mind a strong argument against its existence. In sea bathing, as it now prevails, particular regulations are desirable; the restriction of particular machines to particular spots; a separation of those which are for men from those which are for females; and the prevention of contests as to particular situations. Bathers who do not use machines should be in places of greater privacy, and at a distance from those parts which are generally used for the recreation of walking; and yet the existence of this common law right would be a great obstruction to any such regulations. Indeed, if an individual had the grant of the sea-shore from the crown, and were using it for recreation or bathing, he or his family might be interrupted and deprived of all privacy by the exercise of this common law right. Let it be observed, too, that the whole shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea-shore to other purposes. The king, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require; but may he not also allow other rights to be exercised on other parts? If the soil is vested in an individual, is he to be deprived of the right of saying how that soil shall be used, and of the privilege of making any regulations he may think fit? In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom; and, where that is not the case, the crown, or its grantees, are not likely to withhold it, upon proper terms, and under proper regulations. The case of *Bagott v. Orr*¹ seems to me to conclude nothing on the right in question. The defendant there justified trespassing on the rocks and sands lying within the flowing and reflowing of the tide, on

¹ 2 Bos. & Pul. 472.

the ground that every subject of the realm had the liberty and privilege of getting and taking away shell-fish and shells which had been left there by the tide. The general right of the public to take fish of the sea was admitted in argument ; but the right to take shells cast on the shore was denied ; and it was insisted, besides, that the general right was excluded where the shore was parcel of a manor. The Court thought that the plaintiff should have replied specially, to have raised the question as to excluding the general right ; but they thought the claim as to the shells so questionable, that they offered the defendant leave to amend, by confining his claim to the sea-fish, and that offer the defendant accepted. The claim, therefore, in that case, was very different from the present ; it was a claim for something serving to the sustenance of man, not a matter of recreation only, — a claim to take, when left by the water, what every subject had an undoubted right to have taken whilst they remained in the water ; and upon that claim there was no regular judgment. But it would by no means follow because all the king's subjects have a right to pick up fish on the shore, that they have, therefore, a right to pass over the sea-shore for the purpose of bathing. The passages cited from Lord Hale's treatise, *De Jure Maris*, p. 22 and 36, in which it is laid down, " that the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use," leave the question untouched ; because the question in this case is, what the *jus publicum* is : and that they do not define. Had Lord Hale stated as part of the *jus publicum*, that the public might use the shore as they thought fit ; that they might use it as a public highway, or for the purpose of bathing ; then those passages would have been authorities applicable to this case. But Lord Hale, in fact, only states that the *jus publicum* continues to exist, without defining what it is. Bracton, in l. 1, c. 12, s. 6, does state what the *jus publicum* is ; and if that passage be good law, it is a strong authority in favor of the defendant. The passage is as follows : "*Publica vero sunt*

omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus." Now, he does not even say navigable rivers; but I will assume that by *fluminibus* is meant navigable rivers, and so far as I have cited the passage, I concur in what is there laid down; but he goes on, "*Riparum etiam usus publicus est jure gentium sicut ipsius fluminis.*" That is, that the public have the same right to use the banks of the river that they have to use the river itself, and that, because the water is common to all mankind, the ripa is also common to all mankind. The passage then goes on, "*Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis repone-re, cuius liberum est, sicut per ipsum fluvium navigare.*" The word "ripa" here applies to rivers and ports, and probably, also, to the land above the high water-mark; and, if it do, is this the law of England? have all persons a right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the banks of every navigable river? The case of *Ball v. Herbert*¹ is not a distinct authority upon this point, inasmuch as in that case, the right of towing was claimed. But the general question as to the right of the public on the ripa of a navigable river was discussed, and the Court appear to have been of opinion, that the ripa of a navigable river was not *publici juris*, and they therefore virtually overruled the authority of Bracton. Lord Hale, in his treatise, *De Portibus Maris*, p. 84, after citing this passage, says, "As touching ports, and the public right of them, Bracton saith true; with this alloy, that hath been before observed, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the license or charter of the king, or that which presumes and supplies it, viz. custom and prescription." But in another passage,² Lord Hale says, "Though A. may have the propriety of a creek or harbor, or navigable river, yet the king may grant there the liberty of a port to B., and so the interest of propriety, and the

¹ 3 Term Rep. 262.² Page 73.

interest of franchise, several and divided. And in this, no injury is at all done to A., for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing ; and as the creek was free for any one to pass in it against all but the king, (for it was *publici juris* as to that matter before,) so now the king takes off that restraint, and by his license and charter, makes it free for all to come and unlade. But if A. hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his consent, unless custom had made the liberty thereof free to all, as in many places it is ; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent." There may perhaps be a distinction between the *ripa* of the river where the soil has been long private property, and that space between the high and low water-mark, where the sea ebbs and flows, but if there be such a distinction, what becomes of the authority of Bracton, where he says, "*Riparum etiam usus publicus, est jure gentium sicut ipsius fluminis.*" No man can travel through this kingdom along the banks of rivers, without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of Bracton, and with the supposed common law right now claimed. The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary, that the right should be co-extensive with the whole shore of the sea, or that it should extend to places where the right of fishing with stake nets exists. In the absence of any authority, to show that such right exists, and thinking that the authorities cited do not establish it, and that it would be attended with great inconvenience to the public, if a general right, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom, I am of opinion, that no such right exists, and consequently, that there ought to be judgment for the plaintiff.

ABBOTT, C. J. I have considered this case with very great attention, from the respect I entertain on this and all other occasions for the opinion of my learned Brother Best, though I had no doubt upon the question when it was first presented to me ; nor did the defendant's counsel raise any doubt in my mind by his learned and ingenious argument. This is an action of trespass, brought against the defendant for passing with carriages from some place above high water-mark across that part of the shore which lies between the high and low water-mark, for the conveyance of persons to and from the water for the purpose of bathing. The plaintiff is the undoubted owner of the soil of this part of the shore, and has the exclusive right of fishing thereon with stake nets. The defendant does not rely upon any special custom or prescription for his justification, but insists on a common law right for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose on foot, and with horses and carriages ; and this right is the only matter which, by the terms of the special case, is submitted to the opinion of the Court. Now, if such a common law right existed, there would probably be some mention of it in our books ; but none is found in any book, ancient or modern. If the right exist now, it must have existed at all times ; but we know that sea bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that the carriages, by which the practice has been facilitated and extended, are of comparatively modern invention.

There being no authority in favor of the affirmative of the question, in the terms in which it is proposed, it has been placed in argument at the bar on a broader ground ; and as the waters of the sea are open to the use of all persons for all lawful purposes, it has been contended, as a general proposition, that there must be an equally universal right of access to them, for all such purposes, over land like the present. If this could be established, the defendant must undoubtedly prevail ; because, bathing in the waters of the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or in reason, to support this general proposition.

Commerce is a matter greatly favored in our law, by reason of the public and national benefits derived from it; but, even as to this favored matter, I have found no authority in the law of England in support of such a proposition. Bracton, in the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted, that whatever is true of navigable rivers and their banks, may be true of the sea and of its shore. But the case of *Ball v. Herbert* shows that the doctrine of Bracton, as to the banks of the navigable rivers, however warranted by the civil law, is not conformable to the law of England. "And as touching ports, and the public right to them," says Lord Hale, p. 64, "Bracton saith true: but, with this allay, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the license or charter of the king, or that which presumes and supposes it, viz. custom and prescription." So that even the privilege to be derived from ports cannot be in its nature universal. And, as to ports, Lord Hale, ch. 6, p. 73, distinguishes between the interest of property and the interest of franchise, and says, that "if A. hath the ripa or bank of the port, the king cannot grant liberty to unlade on the bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is." Now, such consent as applied to the natural state of the ripa or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure. And, if there be no general right to unlade merchandise on the shore, there can be no right to traverse the shore with carriages or otherwise for the purpose of unloading; and, consequently, the general proposition to which I have alluded cannot be maintained as a legitimate conclusion from the general right to navigate the water. I have spoken of merchandise, and not of fish; from the latter I studiously abstain, because no question of that kind is before the Court, and it is unnecessary to say any-

¹ 3 T. R. 261.

thing upon it. It will be remembered, also, that I speak only of the general right, which is a matter perfectly distinct from those cases of necessity that often arise out of the perils of navigation. Having thus shown that the general proposition cannot, in my opinion, be maintained, I return to the particular right or privilege claimed in the present case.

One of the topics urged at the bar in favor of this supposed right, was that of public convenience. Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England. It is true, that property of the description of the present is, in general, of little value to its owner; but I do not know how that little is to be protected, and much less how it is ever to be increased, if such a general right be established. If there be a general right of passage across land of this description in the nature of a highway, by what law are stake nets, or other implements of fishing, to be placed there, or sand or stones to be taken away, whereby the exercise of the right which, as claimed, will, in its universality, extend itself over every part of the surface, may be obstructed, or rendered less convenient? By what law can any wharf or quay be made? These, in order to be useful, must be below the high-water mark, that vessels or boats may float to them when the tide is in; but when the tide is out, no carriage can pass them. In some parts of the coast, where the ground is nearly level, the tide ebbs to a great distance, and leaves dry very considerable tracts of land. In such situations, thousands of acres have, at different times, been gained from the sea and its arms by embankments, and converted to pasture or tillage. But how could such improvements have been made, or how can they be made hereafter, without the destruction or infringement of this supposed right? And, it is to be observed, that wharfs, quays, and embankments, and intakes from the sea, are matters of public as well as private benefit.

Another topic relied upon by the defendant was usage and

practice. The practice of modern times can be considered, at the utmost, in the nature only of evidence, more or less cogent according to its extent and uniformity. I am not aware of any practice, in this matter, sufficiently extensive or uniform to be the foundation of a judicial decision. It was said at the bar, that in some places a compensation is made to the owner of the shore; but I do not rely on this assertion as a ground of judgment. In many places, doubtless, nothing is paid. In some parts, the king is the owner of the shore; and it is not probable that any obstruction would be interposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition; others may have had too much discretion to put their title to the soil to the hazard of a trial by an unpopular claim to a matter of little value; others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves. But, further, the practice, as far at least as I am acquainted with it, differs in degree only, and not in kind or quality, from that which prevails as to some inland wastes and commons; and even the difference in degree is, in some instances, not very great. Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback, in all directions, over them, for their health and recreation; and sometimes, even in carriages, deviate from the public paths into those paths which may be so traversed with safety. In the neighborhood of some frequented watering-places, this practice prevails to a very great degree; yet no one ever thought that any right existed in favor of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.

The only remaining topic adduced for the defendant was, that the right may be considered as confined to those instances only wherein it can be exercised without actual prejudice to the owner

of the shore, and subject to all modes of present use, or future improvement, on his part ; but no instance of any public right, so limited and qualified, has been found. Every public right to be exercised over the land of an individual is, *pro tanto*, a diminution of his private rights and enjoyments, both present and future, so far as they may at any time interfere with or obstruct the public right.

But, shall the owner of the soil be allowed to bring an action against any person who may drive his carriage along these parts of the sea-shore, whereby not the smallest injury is done to the owner? The law has provided suitable checks to frivolous and vexatious suits ; and, in general, experience shows that the owners of the shore do not trouble themselves or others for such matters. But where one man endeavors to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavor to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed.

Judgment for the Plaintiff.

MARTIN ET AL., PLAINTIFFS IN ERROR v. LESSEE OF WADDELL,
DEFENDANT IN ERROR.

(16 Peters' U. States Sup. Court Rep. 369.)

IN error to the Circuit Court of the United States for the district of New Jersey.

The defendant in error, the lessee of William C. H. Waddell, instituted, to April term, 1835, in the Circuit Court of the United States for the district of New Jersey, an action of ejectment, against Merrit Martin and others, for the recovery of certain land covered with water, situated in the Raritan bay, below high-water mark, in the State of New Jersey. The defendants appeared to the suit; and at April term, 1837, the cause was tried by a jury, who found a special verdict, on which judgment was afterwards entered for the plaintiff; from which judgment the defendant prosecuted this writ of error.

The case was argued by Mr. Wall, and Mr. Wood, for the plaintiffs in error; and by Mr. Ogden, and Mr. Wright, for the defendant.

The special verdict found that on the 12th day of March, 1664, certain letters patent, duly executed, were granted by Charles the Second, then King of England, to James, Duke of York; and set forth the letters patent at large. The letters patent stated that the King, "For divers good causes and considerations us thereunto moving, having of our special grace, certain knowledge, and mere motion, given and granted, and by these presents, for us, our heirs and successors, do give and grant unto our dearest

brother James, Duke of York, his heirs and assigns, all that part of the main land of New England, beginning at a certain place called or known by the name of St. Croix, next adjoining to New Scotland, in America; and thence extending along the sea-coast, unto a certain place called Petuaquine, or Pemaquid, and so up the river thereof, to the farthest head of the same, as it tendeth northward; and extending from thence to the river of Kennebecque, and so upwards by the shortest course to the river of Canada northward; and also all that island or islands, commonly called by the several name or names of Matowacks or Long Island, situate, lying and being towards the west of Cape Cod, and the Narrow Higansetta, abutting upon the main land between the two rivers there, called or known by the several names of Connecticut or Hudson rivers; together also with the said river called Hudson river, and the lands from the west side of Connecticut to the east side of Delaware bay. And also all those several islands called or known by the names of Martin's Vineyard and Nantucks, or otherwise Nantuckett, (whereof the tenements aforesaid, with the appurtenances in the declaration aforesaid mentioned are parcel;) together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities and hereditaments to said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand, of, in, or to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, together with the yearly and other the rents, revenues, and profits, of all and singular the said premises, and of every part and parcel thereof, to have and to hold all and singular the said lands, islands, hereditaments, and premises, with their and every of their appurtenances, hereby given and granted, or hereinbefore mentioned, to be given and granted unto our dearest brother James, Duke of York, his heirs and assigns forever; to be holden of us, our heirs and successors,

as of our manor of East Greenwich, in our county of Kent, in free and common soccage, and not in capite, nor by knight service, yielding and rendering. And the same James, Duke of York, doth for himself, his heirs and assigns, covenant and promise to yield and render unto our heirs and successors, of and for the same, yearly and every year, forty beaver-skins, when they shall be demanded, or within ninety days after. And we do further of our special grace, certain knowledge, and mere motion, for us, our heirs and successors, give and grant unto our said dearest brother James, Duke of York, his heirs, deputies, agents, commissioners and assigns, by these presents, full and absolute power and authority to correct, punish, pardon, govern, and rule all such the subjects of us, our heirs and successors, as shall from time to time adventure themselves into any the parts or places aforesaid, or that shall or do at any time hereafter inhabit within the same, according to such laws, orders, ordinances, directions and instruments, as by our said dearest brother or his assigns, shall be established, and in defect thereof, in case of necessity, according to the good discretions of his deputies, commissioners, officers or assigns respectively ; as well in all causes and matters capital and criminal, as civil, both marine and others, so always as the said statutes, ordinances and proceedings, be not contrary to, but as near as conveniently may be, agreeable to the laws, statutes and government of this our realm of England ; and saving and reserving to us, our heirs and successors, the receiving, hearing, and determining of the appeal and appeals of all or any person or persons of, in, or belonging to the territories or islands aforesaid, in or touching any judgment or sentence to be there made or given. And further, that it shall and may be lawful, to and for our said dearest brother, his heirs and assigns, by these presents, from time to time, to nominate, make, constitute, ordain, and confirm by such name or names, stile or stiles, as to him or them shall seem good, and likewise to revoke, discharge, change and alter, as well all and singular, the governors, officers and ministers, which hereafter shall be by him or them thought

fit and needful to be made or used within the aforesaid parts and islands; and also to make, ordain and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government and magistracy, fit and necessary for and concerning the government of the territories and islands aforesaid, so always that the same be not contrary to the laws and statutes of this our realm of England, but as near as may be agreeable thereunto, and the same at all times hereafter to put in execution, or abrogate, revoke, or change, not only within the precincts of the said territories or islands, but also upon the seas, in going and coming to and from the same, as he or they in their good discretion shall think to be fittest for the good of the adventurers and inhabitants there; and we do further, of our own special grace, certain knowledge, and mere motion, grant, ordain, and declare that such governors, officers and ministers, as from time to time shall be authorized and appointed in manner and form aforesaid, shall and may have full power and authority to use and exercise martial law, in cases of rebellion, insurrection, and mutiny, in as large and ample a manner as our lieutenants in our counties within our realm of England have or ought to have, by force of their commission of lieutenancy, or any law or statute of this our realm; and we do further, by these presents, for us, our heirs and successors, grant unto our said dearest brother James, Duke of York, his heirs and assigns, that it shall and may be lawful to and for the said James, Duke of York, his heirs and assigns, in his or their discretion, from time to time, to admit such and so many persons or persons to trade and traffic unto and within the said territories and islands aforesaid, and into every or any part or parcel thereof, and to have, possess, and enjoy any lands or hereditaments in the parts and places aforesaid, as they shall think fit, according to the laws, orders, constitutions, and ordinances by our said brother, his heirs, deputies, commissioners, and assigns, from time to time to be made and established by virtue of, and according to the true intent and meaning of these presents; and under such conditions, reservations, and agreements as our said brother, his

heirs or assigns, shall set down, order, direct and appoint, and not otherwise, as aforesaid ; and we do further of our special grace, certain knowledge, and mere motion, for us our heirs and successors, give and grant unto our said dearest brother, his heirs and assigns, by these presents, that it shall and may be lawful to and for him, them, or any of them at all, and every time and times hereafter, out of any of our realms or dominions whatsoever, to take, lead, carry, and transport in and into their voyages, and for and towards the plantations of our said territories and islands, all such and so many of our loving subjects, or any other strangers being not prohibited or under restraint, that will become our loving subjects, and live under our allegiance, as shall willingly accompany them in the said voyages ; together with all such clothing, implements, furniture, and other things usually transported, and not prohibited, as shall be necessary for the inhabitants of the said islands and territories, and for their use and defence thereof, and managing and carrying on the trade with the people there ; and in passing and returning to and fro, yielding and paying to us, our heirs and successors, the customs and duties, due and payable, according to the laws and customs of this realm.

“And we also, for us, our heirs, and successors, grant to our said dearest brother James, Duke of York, his heirs and assigns, and to all and every such governor or governors, or other officers or ministers as by our said dear brother, his heirs or assigns, shall be appointed, to have power and authority of government and command in or over the inhabitants of the said territories or islands, that they and every of them, shall and lawfully may from time to time, and all times hereafter, forever, for their several defence and safety, encounter, expulse, repel, and resist, by force of arms, as well by sea as by land, and all ways and means whatsoever, all such person and persons, as without the special license of our said dearest brother, his heirs or assigns, shall attempt to inhabit within the several precincts and limits of our said territories and islands, and also all and every such person and persons

whatsoever, as shall enterprise or attempt at any time hereafter, the destruction, invasion, detriment, or annoyance to the parts, places, or islands aforesaid, or any part thereof; and, lastly, our will and pleasure is, and we do hereby declare and grant, that these our letters patent, or the enrolment thereof, shall be good and effectual in the law, to all intents and purposes whatsoever, notwithstanding the not reciting or mentioning of the premises or any part thereof, or the metes or bounds thereof, or of any former or other letters patent or grants heretofore made or granted of the premises, or of any part thereof, by us or of any of our progenitors, unto any other person or persons whatsoever, bodies politic or corporate, or any act, law, or other restraint, uncertainty, or imperfection whatsoever, to the contrary in anywise notwithstanding; although express mention of the true yearly value or certainty of the premises, or any of them, or of any other gifts or grants by us, or by any of our progenitors or predecessors heretofore made, to the said James, Duke of York, in these presents is not made, or any statute, act, ordinance, provision, proclamation, or restriction heretofore had, made, enacted, ordained, or provided, or any other matter, cause, or thing whatsoever, to the contrary thereof in anywise notwithstanding."

The special verdict further found that, on the 23d day of June, 1664, James, Duke of York, by indenture conveyed to Lord Berkley and Sir George Carteret, for a competent sum of money, all that tract of land adjacent to New England, lying and being to the westward of Long Island, and Manhitas Island, and bounded on the east, part by the main sea and part by Hudson's river, having upon the west, Delaware bay or river, and extending southward to the main ocean as far as Cape May, at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in forty-one degrees and forty minutes of latitude, and crossing over thence in a straight line to Hudson's river, in forty-one degrees of latitude; which said tract of land so as aforesaid demised, was, by the terms of the said indenture, thereafter to be called

New Cæsaræa or New Jersey, and was a portion and part of the said tract of land, so as aforesaid granted by the said Charles the Second to the said James, Duke of York, and of which said tract so as aforesaid demised, the tenants aforesaid, with the appurtenances in the declaration aforesaid mentioned, are parcel. To have and to hold to the said John, Lord Berkley, and Sir George Carteret, from the day next before the day of the date of the said indenture, for one whole year thence next ensuing. By virtue whereof, the said John, Lord Berkley, and Sir George Carteret, into the tenements so as aforesaid demised with the appurtenances entered, and were possessed thereof, for the term aforesaid, and being so thereof possessed, afterwards to wit, on the twenty-fourth day of the same month of June, in the year last aforesaid, by a certain indenture made between the said James, Duke of York, of the one part, and the said John, Lord Berkley, and Sir George Carteret of the other part, bearing date the same day and year last aforesaid, for and in consideration of a competent sum of good and lawful money of England, to the said James, Duke of York, paid by the said John, Lord Berkley, and the said Sir George Carteret, he, the said James, Duke of York, granted, bargained, sold, leased, and confirmed to the said John, Lord Berkley, and Sir George Carteret, and to their heirs and assigns forever, they then being in their actual possession, the tenements last aforesaid, with the appurtenances, so as aforesaid, to be called New Cæsaræa or New Jersey; and also, all rivers, mines, minerals, woods, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments whatsoever, to the said land and premises belonging, or in anywise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said James, Duke of York, by the before-recited letters patent, to have and to hold the tenements last aforesaid, with the appurtenances and every of them, unto the said John, Lord Berkley, and Sir George Carteret, their heirs and assigns forever.

The special verdict further found that afterwards, on the 29th

day of June, 1674, King Charles the Second granted to James, Duke of York, and on the 28th and 29th days of July, 1674, James, Duke of York, for a competent sum of money, granted and conveyed to Sir George Carteret, all that tract of land adjacent to New England, lying and being to the westward of Long Island and Manhitas Island, and bounded on the east, part by the main sea, and part by Hudson's river, extending southward as far as a certain creek, called Barnagat, being about the middle between Sandy Point and Cape May, and bounded on the west, in a straight line from said creek, called Barnagat, to a certain creek in Delaware river, called Renkokus Kill, and thence up the said Delaware river, to the northernmost branch thereof, in latitude forty-one degrees and forty minutes, and on the north, crossing over in a straight line to Hudson's river, in forty-one degrees of latitude, (of which said tract of land and premises last mentioned and demised, the tenements aforesaid, with the appurtenances in the declaration aforesaid mentioned are parcel,) together with all mines, minerals, woods, rivers, fishings, hawkings, huntings, and fowlings, and all the royalties, profits, commodities, and hereditaments whatsoever, to the said last-mentioned tenements belonging, or in anywise appertaining: with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said James, Duke of York, by the before-recited letters patent; to have and to hold the tenements last aforesaid, with the appurtenances, and every of them unto the said Sir George Carteret, his heirs and assigns forever. And, further, that previous to the execution of the said last-mentioned letters patent, and of the said several herein before-mentioned indentures following the same, to wit, on the thirteenth day of June, in the year of our Lord one thousand six hundred and seventy-four, by a certain proclamation published and promulgated on the same day and year last aforesaid, by the said Charles the Second; he, the said Charles the Second, did command and charge all persons whatsoever, inhabiting the said province of New Cassara or New Jersey, whereof the tenements aforesaid, with the appurte-

nances in the declaration aforesaid mentioned, are parcel, to yield obedience to the laws and government which were or should be thereafter established in the said province, by the said Sir George Carteret, (who, in the words of the said proclamation, had the sole power under him, the said Charles the Second, to settle and dispose of the said province, upon such terms and conditions as to him, the said Sir George Carteret, should appear fit), upon pain of incurring the high displeasure of the said Charles the Second, and of being proceeded against according to law.

The jury further found that afterwards by conveyances from Sir George Carteret to divers persons, and by conveyances from Lord Berkley and the will of Sir George Carteret and sundry meane conveyances and deeds of partition, set forth in the special verdict, and by a deed of confirmation from the Duke of York, the part of the province of New Jersey, called East New Jersey, of which the premises in this ejectment are part, became vested in twenty-four proprietors, and all rights, benefits, and advantages, and all and every the isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings, fowlings, and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities, and hereditaments whatsoever, unto the said easterly part of the said province of New Jersey, belonging or in anywise appertaining, with their and every of their appurtenances; and all the estate, right, title, and interest, claim and advantage, whatsoever, as well in law as in equity, of the said grantors, and each and every of them, of, in, unto, and out of said easterly part of the said province of New Jersey, and of every part and parcel thereof, and the reversion and reversions, remainder and remainders, of the same, and of every part and parcel thereof, and all the rents, duties, services, reserved upon any estates or grants theretofore made by the said Lord Berkley and Sir George Carteret, or by any persons claiming any estate, interest or authority, from, by, or under either of them, of any part of the said premises thereby conveyed unto the said Sir George Carteret, to have and to hold to the said Sir George Car-

teret, and to his heirs and assigns in severalty, to the sole and only use of the said Sir George Carteret, his heirs and assigns forever; and that it was further agreed and covenanted in the said indenture, quintipartite, that the part of the said province of New Jersey, therein conveyed to the said Sir George Carteret, should thereafter be known and distinguished by the name of East New Jersey.

The jurors further found that on the fourteenth day of March, 1682, the Duke of York, in consideration of a competent sum of money for the better extinguishing of all such claims and demands as the said Duke of York, and his heirs might in anywise have, of, or in the premises, with the appurtenances, called East New Jersey, as aforesaid, did grant, bargain, sell, release, convey, and confirm unto the said twenty-four proprietors, their heirs and assigns, all the premises, with the appurtenances so as aforesaid, called East New Jersey, and every part and parcel thereof, together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises, whatsoever, to the same belonging, or in anywise appertaining, and also, the free use of all bays, rivers, and waters leading unto, or lying between the said last-mentioned premises, or any of them, for free trade, navigation, fishery, or otherwise, to have and to hold, to the said twenty-four proprietors, their heirs and assigns forever to the only proper use and behoof of the said twenty-four proprietors, their heirs and assigns forever. And that the said Duke of York, by the said last-mentioned indenture, did also grant, transfer, and assign to the said twenty-four proprietors, and to their heirs and assigns, proprietors of the said province of East New Jersey for the time being, all and every such, and the same powers, authorized jurisdictions, governments, and other matters and things whatsoever, which by the said several above-recited letters patent, from the said Charles the Second, to the said Duke of York, or either of them, were granted or intended to be granted, to be exercised by the said Duke of York, his heirs, or assigns, his or their agents, or officers in or upon the said premises, by the said last-mentioned

indenture, confirmed or intended to be thereby confirmed, and every of them, to be held, enjoyed, exercised, and executed by the said twenty-four proprietors, their heirs and assigns, proprietors of the said last-mentioned premises, for the time being, as fully, amply, to all intents, constructions, and purposes, as the said Duke of York, or his heirs could or ought to hold, enjoy, use, exercise, or execute the same by force and virtue of the said several above-recited letters patent or otherwise, howsoever.

The jurors further found that King Charles the Second, on the twenty-third day of November, 1683, by an instrument in writing, duly executed, and reciting the said last-mentioned indenture, from the said Duke of York, to the said twenty-four proprietors, did recognise their right to the soil and government of the said province of East New Jersey, and did strictly charge and command the planters and inhabitants, and all other persons concerned in the same, to submit and yield all due obedience to the laws and government of the said twenty-four proprietors, their heirs, and assigns, as absolute proprietors and governors thereof, who in the words of the said instrument in writing, had the sole power and right, derived under the said Duke of York, from him the said Charles the Second, to settle and dispose of the said province of East New Jersey, upon such terms and conditions as to the twenty-four proprietors, their heirs and assigns, should seem meet, as also, to their deputy or deputies, agents, lieutenants, and officers lawfully commissioned by them, according to the powers and conditions granted to them.

The jurors further found that afterwards, on the fifteenth day of April, 1702, the said twenty-four proprietors, and the other persons, in whom the whole estate, right, title, and interest in the said province of East New Jersey were vested, at the said last-mentioned date as proprietors thereof, by an instrument in writing, under their hands and seals, bearing date the same day and year last aforesaid, did for themselves, and their heirs, surrender and yield up unto Anne, Queen of England, &c., and to her heirs and successors, all the powers and authorities in the said

letters patent granted, to correct, furnish pardon, govern, and rule all or any of her said majesty's subjects or others, who then were as inhabited or thereafter might adventure into or inhabit within the said province of East New Jersey; and also to nominate, make, constitute, ordain, and confirm any laws, orders, ordinances, directions, and instruments for those purposes or any of them, and to nominate, constitute or appoint, revoke, discharge, change, or alter any governor or governors, officers or ministers, which were or should be appointed within the said province, and to make, ordain, and establish, any orders, laws, directions, instruments, forms or ceremonies of government and magistracy, for or concerning the same, or on the sea in going to or coming from the same, or to put in execution or abrogate, revoke or change such as were already made for or concerning such government or any of them; and also all the powers and authorities by the said letters patent granted, to use and exercise martial law in the said province of East New Jersey, and to admit any person or persons to trade or traffic there; and of encountering, repelling and resisting by force of arms, any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns, and all other the powers, authorities, and privileges of, and concerning the government of the province last aforesaid, or the inhabitants thereof, which were granted or mentioned to be granted by the said several above-recited letters patent, or either of them. And that the same Queen Anne, afterwards, to wit, on the seventeenth day of the same month April, in the year last aforesaid, did accept of the said surrender of the said powers of government, so made by the said proprietors in and over the premises last aforesaid.

And the jurors further found that afterwards, on the 25th of November, 1824, the legislature of the State of New Jersey passed an act, which declared that the shore and land covered by the waters of the sound and Raritan river, in the township of Perth Amboy, should be set apart for the purpose of planting and growing oysters, subject to a rent to be paid to the State of New

Jersey, and authorized the commissioners, acting under the law, to permit the owners of the adjacent land to stake off lots within the surveys of the commissioners; which surveys of the land covered with water, the commissioners were directed to make. The jury found that the defendants in the ejectment, having complied with the regulations of the act of Assembly, were in possession of the lands covered with water, for the recovery of which the ejectment was brought.

The jury found the premises in dispute are situated beneath the waters of the Raritan river and bay, where the tide ebbs and flows. That the plaintiffs in the ejectment claimed title under regular conveyances from those to whom the proprietors of East Jersey had given deeds in fee-simple for the premises claimed by them.

The cause was argued at large, by the counsel for the plaintiffs and the defendants, on many points; but the decision of the Supreme Court having been given exclusively on the questions presented on the construction and effect of the letters patent, and the effect of the surrender by the proprietors of East Jersey to Queen Anne, in 1702, the arguments of counsel on these questions only are given.

Mr. Wood, (with whom was Mr. Wall,) for the plaintiffs in error. ¶ It is admitted that the King of Great Britain, Charles the Second, had the power to grant the territory of New Jersey, as private property, and that he did so grant it, including private rivers, ordinary mines, &c. This territory was discovered and held, not for revenue, but for colonization and settlement. After the grant, it was held by the proprietors as private property detached from government, and not as demesne lands of the government. This is conformable to usage. The proceeds of sales of the territory went into the private purse of the proprietors, and was not applied to the fiscal purposes of the government. Taxes were resorted to under the proprietary government to raise revenue.

It is also admitted, that the king had power to create colonial and palatine governments, and jurisdictions. This power was disputed and denied after the Revolution of 1688 ; but this did not operate retrospectively, and destroy such patents as were already granted.

It is also admitted that the surrender to Queen Anne embraced no private property ; but that the same was all reserved to the proprietors.

To enable the plaintiff below to recover, he must be able to maintain two positions ; 1st, That he has a possessory title to the premises in question, the soil of this navigable water ; and, 2dly, That there was not a common right of fishery in the people at large in the premises in question.

In ejectment, the party must recover possession of the soil, and therefore he must show a possessory title.

If there was in the people of New Jersey a common right of fishery, the legislature exercising plenary sovereignty could unquestionably dispose of it, modify it, lease it, and exercise every act of ownership and control over it. Of course, the lease of it under the statute to the defendant would be good. The use and occupancy of the premises by the defendant, is only commensurate with that right. He does not pretend to take absolute possession of the soil. He cannot be ejected from a possession commensurate with his right.

Has the plaintiff shown a possessory title to the soil ?

All titles in New Jersey go back to the grant of Charles the Second to the Duke of York ; and much depends upon the sound construction of this grant, in reference to the premises in question.

There are, according to our view, two prominent errors in that opinion of which we complain ; and it may contribute to a right understanding of the argument to point them out at the threshold.

First. In a grant by the king of prerogative rights to a subordinate governor, the regalia thus granted continue attached to the government, in the same way as when they were in the hands of the crown. In the grant of the right to an individual, they be-

come mere private property — private franchises. The distinction, as will be shown, was in the mind of the Circuit Court; but it did not make such a vivid impression as to induce the Court to carry it out to its legitimate results.

Secondly. It is thought the Court erred in clothing the king with too despotic a power over the territory in question — treating him as an absolute despot, independent of parliament, and in considering the grant as transferring to the duke such absolute powers.

It is admitted this royal grant has a double aspect — a public and a private aspect. The plaintiff below must succeed in bringing his claim under the second point if he succeed at all.

This country was held by right of discovery, and not conquest.

It was only retaken from the Dutch and claimed on the ground of this prior right of discovery. Smith's New Jersey Laws, 36, 37; 1 Story on the Constitution, 136; Chitty's Prerog. 29, 30; *Canal Commissioners v. The People*, 5 Wend. 445; *Bogardus v. Trinity Church*, 4 Paige, 178.

The inhabitants emigrating to this country carried with them the laws of England, so far as they were applicable to their situation. 4 Paige, 178; 2 P. Wms. 75; 2 Salk. 411; Clark's Colonial Law, 7; 1 Chalmers's Opinions, 198; 2 Chalmers's Opinions, 202. The use of fisheries and rivers, as common property, was peculiarly applicable to their situation.

If claimed by conquest, the English, when invited to settle there, would carry with them their own laws and constitutional rights. 1 Story on the Constitution, 111, and cases cited.

Again, if claimed by conquest, even as to the conquered, the moment English law is introduced by proclamation or otherwise, it is irrevocable by the king. Cowp. R. 213. Here it was introduced in the royal grant itself.

The great principles of British liberty must be considered as accompanying this royal charter, and it must be construed accordingly.

It is matter of history that the Stuarts, to encourage emigration, introduced into these colonies the broadest principles of

British liberty. The fundamental constitutions of New York show this. The people have always appealed to Magna Charta as the foundation of American as well as British liberty.

There is no language in this royal grant that will pass the sea and its arms as private property.

We must here treat it in the same way as if the king had granted a tract of land to a private individual. The plaintiff below can derive no aid from its being a public grant of territory and government. In that sense, we admit, the rivers passed; and will presently show how they passed.

We contend, first, that the sea and its arms were part of the regalia or prerogative rights of the crown.

And, secondly, that they could not, upon a sound construction of this charter, pass as private property to the duke in his private capacity.

First. They are always called royal rivers. *Banne Case*, Davies's Rep. 155; *Shultze, Aquatic Rights*, 1 Bl. Com. 264. Prerogative rights are such as are pre-eminently in the king by way of preference over his subjects. Such as royal mines, wrecks, royal fish.

Such rights as are held by the king on the same common ground as a subject holds, and are not prerogative rights. Such, for instance, as private rivers and the ordinary demesne lands of the crown. *Chitty's Prerog.* 4. Royal rivers are pre-eminently in the king. Private rivers are presumed to be owned by the adjacent proprietors. Not so with public rivers; they are, at common law, in the king.

Again. The sea and its arms are peculiarly and pre-eminently in the king, in respect to their uses; all of which, at common law, are public, and they are held by the king for the public benefit, viz., navigation, fishery, the mooring of vessels, which is subject to the *jus preventionis*. *Angel on Tide-waters*, 158.

The private rights arise only after the charter is changed, as in the case of alluvion, wharfing out, draining, &c. Such rights until consummated are mere possibilities.

The right in the sea and its arms centres in the king for conservation of the public use. As a highway is called in the law the king's highway.

The counsel for the proprietors in *Moody v. Arnold* contended there was no distinction between the rights of the king, inasmuch as they were all held by the king, under his prerogative or political capacity. 1 Halsted, 58. This argument confounded the distinction between the capacity in which the king holds, and the rights held by him. Though he holds all in his political capacity, he holds some pre-eminently as regalia or royal rights. General words, "rivers, mines," &c., do not pass royal rivers, royal mines. Cases of Mines, Plowd. 333, 334, 336; Alton Wood's Case, 1 Co. 46 b; 16 Vin. 597, Prerog. Ka. sec. 27; Chitty's Prerog. 392; *Canal Commissioners v. The People*, 5 Wend. 451.

Nothing passes against the king by implication. *Banne Case*, Davies's Rep. 157; *Jure Coronæ*, 117; 7 Conn. Rep. 200. The term "rivers" will not pass the soil. Davies's Rep. 154. The terms "*ex certa scientia*," &c., never have the effect to enlarge the construction so as to embrace prerogative rights, in such general terms. Alton Wood's Case, 1 Co. 46 b, and the above case in 16 Viner.

Such general terms as "all royalties," will not have the effect. 7 Conn. Rep. 200. But in the grant in question, it is all royalties appertaining to the premises granted. "Appurtenances" will pass nothing, except such things as are strictly appurtenant. Chitty's Prerog. 392. It will not be pretended that royal rivers are appurtenant to the adjacent private land.

These doctrines were fully maintained in this Court, in the case of Charles River Bridge, in 11 Peters. It will also be borne in mind, that this ancient grant is to be construed in reference to the rights of the prerogative, as then understood.

We shall now view this royal charter in its other aspects as a great state paper, containing a transfer of territory with the powers of government, according to the principles of the British constitution.

In this respect it is to be construed upon liberal principles of public law. We admit that under this aspect of the case the regalia passed. And we contend that, if the grants did contain language sufficient to pass them on technical grounds, they will be construed to pass to the duke as the regalia of the government; he standing in the place of the crown, to hold them as the king held them. All the regalia, such as the sea and its arms, or the royal rivers, royal mines, wrecks, &c., &c., were held by the duke and the proprietary government under him, as attached to the government. The duke being in the place of the king in respect to them. 1 Halsted, 77, 78.

This construction is supported by considering, First, The character and purpose in and for which the territory was held by the king. Secondly, The design of the royal grants.

First. The territory was held and could only be held for settlement by colonization or otherwise. If held to lie idle, there would be the same objection to it as to the Indian title.

Secondly. The design of the grant was to colonize and settle with British subjects, in order to consummate the title and extend the British dominions. The purpose was, as the grant purports on its face, to introduce British law, and the British constitution.

To effect these great objects, it was indispensable that all the regalia or royal rights should be held here as they were in England, attached to the government, and for the benefit of the people.

Prerogative rights are held for the benefit of the community; more especially those charged with the common use, as royal rivers. Chitty's Prerog. 4; 4 T. R. 410; The Elisha, 5 Rob. Adm. Rep. 159. According to this view of the grant, the sea and its arms may correctly be said to be appurtenant to the government and territory as a colonial domain.

This construction is illustrated by the cases of counties palatine.

The count palatine derives his name, a *pelatio*, from his standing in the place of the king, and indictments are charged against

his peace. 4 Inst. 204. Hence lands in a county palatine, when granted by the count, pass within livery. 4 Inst. 206. Lands may be holden of him in capite, though they cannot be of a private subject. Davies's Rep. 181.

The regalia are not private, as they would be in the hands of an ordinary subject. The count palatine can establish Courts of justice.

The regalia in a county palatine are incident to the government. *Boss v. Bishop of Durham*, 2 Bulst. 226, 227. It is sufficient to prescribe for franchises not granted, by showing a county palatine. 4 Com. Dig. Franchise, D. 7.

A county palatine is an inferior subordinate jurisdiction in the heart of the kingdom, with mere judicial and administrative powers.

A colonial government extends over a large territory, and is clothed with high legislative and executive power as well as judicial — with complete, though subordinate sovereignty.

If the regalia pass in a county palatine, as incident to the subordinate jurisdiction, the reasons for passing them as incident to the colonial government, to be held and applied to the benefit of the colonists, applies with tenfold force.

The surrender by the proprietors of the government to Queen Anne, included a surrender of all the regalia, such as wrecks, royal rivers, &c. 1st. Impliedly. 2d. In express terms.

1st. Impliedly.—If the above view taken of the grant be correct, this follows of course : —

If these regalia were by the royal grant converted into mere private franchises in the hands of individuals, as private property, detached altogether from the government, as we have admitted to be in the case with the soil and private rivers, then they were not surrendered. If they continued concomitants of the government, then clearly they were surrendered. What is a surrender but a retransfer? If the regalia pass incidentally by the creation or transfer of the sovereign power, they will, of course, pass by the surrender or retransfer thereof. A king *de facto* takes the jure regalia. Chitt. Prerog. 205.

But there are in this surrender express terms, apt and sufficient to retransfer the regalia to the crown.

They surrender all powers, authorities, and privileges of and concerning the government, and the inhabitants thereof. Leaming and Spicer, 615.

"Privileges" embraces the regalia in their hands. It was so understood by the proprietors. Sec. 13. It is so used at common law. 7 Com. Dig. Prerog. D. 32.

If only the high political powers of government were designed to be surrendered, why was this language inserted in the surrender? The government itself embraces all these high political powers, and is senseless without them. All the minor jura regalia concerned the government and the inhabitants.

The protocol is referred to, Leaming and Spicer, 590, 596, wherein it is stated that the rights in the seas cannot well be circumscribed. The rights of the seas there referred to, were wrecks, royal fish, &c.

Now, any one familiar with the jurisprudence of New Jersey, knows that the proprietors never claimed or pretended, after the surrender, to claim these rights. The error here arises from attending to the protocol or negotiation, instead of the surrender itself. The proprietors negotiated for a reservation of those rights, like the Duke of Athol. But though the commissioners were at first disposed to concede some of them, yet finally none of them were reserved in the surrender. But this attempt, on the part of the proprietors to procure such a reservation, shows they were satisfied that the surrender would pass them to the crown, unless an express reservation could be obtained.

In the construction of all ancient instruments, but more especially of public grants, long continued usage should have great influence.

Next as to the rights in the sea and its arms.

1. As to wrecks. This is one of the minor regalia respecting property, and is often vested in the subject as a franchise. Lords of manors bordering on the sea frequently claim it. Yet this

was surrendered, and has been the subject of repeated regulation by statutes providing when and under what circumstances the proceeds shall be paid into the state exchequer. Patterson's Laws, 385.

2. Ferries when established — wharves, ferry-stairs, piers, &c., stretch into the rivers and bays. If over a private river, the owner of the ferry would have to purchase the land of the owner of the river. No such claim to the public rivers has been set up by the proprietors.

3. Bridges. Toll bridges, and bridges connected with turn-pikes, railroads, &c., when established over a public river, occupying the soil, would be an encroachment upon the rights of the proprietors, if they owned the bed of such river. Compensation in such cases is always made to the owners of private rivers and fast land; but none has been made to the proprietors as owners of the public rivers.

4. The right of the riparian proprietor to wharf out into the public river, is a local custom in New Jersey. How can the growth of such a custom be reconciled with the idea that the soil and fisheries in those public waters were the private property of the lords proprietors.

5. In all the public waters of the State they have two kinds of fisheries — common fisheries, and private or shore fisheries — belonging to the riparian owner. The latter is confined to fisheries for those kind of fish which were usually taken by hauling the net upon the shore, and are called shore fisheries. By long usage, these kinds of fisheries have grown into private rights, belonging to the riparian owner, and have been recognised by repeated legislative acts. *Bennet v. Boggs*, 1 Baldwin's Rep. 70. Those common of fisheries and riparian several fisheries are all incompatible with the claims of the proprietors, who, under such claims, would have had several fisheries in all the rivers, and disposed of them to their grantees.

The Delaware was by an early law declared to be a common fishery. But this grew out of the controversy with Pennsylvania,

and was the assertion of a right as against them. The same common rights of fishery have existed in all the other waters of the State. Leaming and Spicer, 480.

6. The oyster fisheries are common in all the rivers and bays of the State, and have always been protected as such.

The acts recite the rights of the poor to take oysters, and protect them from encroachment by citizens of other States; all founded on the idea of common right. 1 Halsted, 90, 91; 1 Allison's N. J. Laws, 57, Preamble; 1 Pat. 203; 1 Neville, 87.

It is not pretended that the proprietors have ever possessed or enjoyed any of the regalia since the surrender. They have occasionally made a few grants which have extended over these public waters, but they have been very few. Their grants have almost invariably been confined to the bank or margin of the public rivers. See 4 Griffith's Law Register, 1292. But in the few grants they have made, it is not pretended that the grantees have ever set up several fisheries for oysters, or floating fish; or claimed and exercised an exclusive right in any other way.

One would suppose, if the proprietors had claimed the regalia after the surrender, they would at once have asserted and exercised the right of extinguishing the Indian title, a prerogative right appertaining to private property. But this has never been claimed or exercised independently of license from the royal government. General usage in New Jersey, then, is decidedly hostile to this extraordinary claim of the proprietors.

A question has arisen whether the King of England can grant the soil of the sea and its arms, so as to destroy or prejudice public rights. Not considering this question at all material to the main argument, I have purposely kept it out.

If he had not such a power, however, it serves to strengthen the construction of the royal grant that he did not intend thus to convey the sea and its arms by this charter. It has been shown that all the uses to which these public waters can be applied are public and common.

It is only when the waters are excluded from the soil by allu-

vion, wharfing out, &c., &c., that it becomes private ; and then the whole character is changed. *Udall v. The Trustees of Brooklyn*, 19 Johns. Rep. 175.

To grant the soil, so as to give an individual the right to take it after such a change, has been made a nice question ; and it has been stated that a grant to have this effect must be specially formed. Harg. 18 ; 2 Anst. 604, 609. But why need it be so specially formed, if the king can at once grant so as to vest in an individual the soil, and divested of all common use before the change takes place ?

Common of fishery is a right which may be specially pleaded, and cannot be traversed. *Richardson v. The Mayor of Orford*, 2 H. Black. 182 ; S. C. 4 Term Rep. 437 ; *Ward v. Creswell*, Willes' Rep. 268. A grant of soil cannot destroy the common right of fishery. Chit. Prerog. 142 ; 2 Bl. Com. 39. The distinction drawn by Blackstone between free and several fisheries is not that the latter requires an ownership of the soil, but an exclusive fishery in a private river, granted by a private person. See Chitty on Fisheries, 243-269. Harg. p. 11, admits a common right of fishery cannot be destroyed.

The grants and pre-emptive rights spoken of in the books are claims by prescription, and grants of prescriptive rights, arising or presumed to have arisen prior to Magna Charta. See also 5 Mod. 73 ; Siderfin, 148, 149 ; 16 Vin. Piscary, b. 1 ; Year Book, 8th ed. 4, 18 ; 7 East, 195 ; 1 Inst. Magna Charta, ch. 16, 23.

The grant of the river Thames opposite London, is founded on an ancient prescriptive grant. Shultze, 56. No case can be shown of a grant since Magna Charta and its confirmation, not founded on an ancient prescriptive right.

The royal fisheries in the river Banne were special royalties, the ancient inheritance of the crown resting upon old charters, collected from the Pipe Rolls ; the evidence of which as there adduced, would have been superfluous, if the king has the right and power over the navigable waters here contended for.

The only remaining question to be considered is the effect of

the decisions of *Arnold v. Mundy*, 1 Halsted, 1; and 1 Penning. Rep. 391.

The first of these cases occupied the whole ground. The suit was brought on a location made under the proprietors with a view to try the right. In the other case the question came up incidentally.

The object of this suit unquestionably was, to review and overturn the decision of *Arnold v. Mundy*.

There is no pretence for alleging that any question under the Constitution of the United States arose in *Mundy v. Arnold*. The question was of unwritten local laws, resting on the construction of an ancient charter applicable to real property, and affected by the usages of the State.

The jurisdiction of this Court over cases where citizens of another State than the one in which the suit arises are concerned, rests upon the ground that the federal Courts, in applying the law, will be more free from any undue influence.

But it is State law they are to apply, not to review, alter, or remodel State law.

The jurisdiction of this Court is not controlling or reviewing. It is not, so far as respects the settling of State law, equal. It is subordinate. The federal Courts follow, and do not lead. Their jurisdiction is occasional. Perhaps not one part in ten thousand of the public waters in question are under the jurisdiction of this Court at all.

The members of this Court cannot be expected to be acquainted with all those local usages and opinions which enter into and modify the laws of a State, especially its unwritten law. Hence this Court has decided that the State judiciary is presumed best to know its own law, and is the appropriate organ to expound and settle it. *Elmendorf v. Taylor*, 10 Wheat. 160; *Bell v. Morrison*, 1 Peters, 359, 360. Hence this Court follows and changes with the State law. *Green v. Neal*, 6 Peters, 301.

It is said the decision in *Arnold v. Mundy* was not carried up and decided in the Court of Appeals. The true point to be as-

certained is, whether that decision is State law ; whether it has been so far adopted and acted upon as to form a part of its unwritten law.

There are two branches of unwritten law in relation to this subject.

1. Those old and well-established doctrines about which there can be no dispute, and which can never be modified or changed without legislative interference, such as the law of descents.

2. Adjudications upon cases constantly arising, attended with new combinations of circumstances. It is in reference to this second branch, that the rule applies. Under the maxim, *stare decisis*, these adjudications form part of the unwritten common law. But they may occasionally, when found not to work well, be modified. This flexibility is made to harmonize with the stability resulting from the application of the above maxim. The power of reconsidering and new-modelling adjudications will be exercised with great delicacy and caution. Adjudications once deliberately made, are held as forming part of the settled law ; notwithstanding this occasional interference with the rule. An occasional deviation does not impair the character of a fixed rule. When an adjudication is once deliberately made by a Court competent to settle the law, the power of disturbing or remodelling it does not belong to the tribunal of a foreign government.

If such a point came up in the Supreme Court of any other State upon the local law of New Jersey, and it might come up incidentally, such a decision as in *Arnold v. Mundy* would be implicitly followed. The Courts at Westminster Hall would implicitly follow it. This Court, under the decision of *Green v. Neal*, would implicitly follow it.

Is the Supreme Court of New Jersey competent to settle law ; or must it be carried up to the Court of Appeals ? The appeals to that Court are only occasional. There are no reports of their decisions. The decisions of the Supreme Court are all reported by law ; and they have, by force of law and usage, the authority of binding precedents in the State when not appealed from.

When cited in other cases, even in the Court of Appeals, they are respected as precedents and as State law ; more especially when they have stood for years, and have become the basis of business transactions and of legislative action, as in the present case.

It is also objected, that there has been but one decision upon this point. One decision fully and thoroughly investigated may be more effective than half a dozen decisions slightly considered. This ought not to be made a question of arithmetic. There are seldom in any case fully discussed more than one decision, because a court will not, unless in a very special case, hear a second argument in the same or in another cause on the same point. It may, in other cases, be incidentally alluded to, but this can add little weight to the force of the decision. If that is wanted, we have it in this case. The doctrine was incidentally passed upon in 1 Penning. Rep. 391. Tide-waters were there held by the Court, and admitted by all the counsel, to be public navigable rivers. The oyster fishery there, was only deemed to be public and common on that account. It has nowhere been decided by this Court, that there must be more than one decision, or a decision of the Court of Appeals in those States where they have such Courts, in order to introduce a case into the settled law of the State ; such a doctrine, if carried out, would unsettle a vast body of law, and would be productive of infinite mischief in those States where a branch of the legislative body forms an occasional Court of Appeal. Remarks made by the Court in the case before them, must be taken in reference to the circumstances. In a case where the decision was by the State Court of Appeals, it may be said to form a part of the settled law ; so where there have been several decisions, as sometimes happens in will cases, they may be said to have the same effect ; but it does not follow that one decision may not have the same effect. In 5 Peters, 151, and 6 Peters, 299, this Court followed a single decision of the State Courts. A contrary doctrine would lead to unfortunate conflicts between the State and federal judiciary. If this Court should attempt to

overturn *Arnold v. Mundy*, it could not be binding upon the State Courts. There would then be only one decision here. And upon the principles already settled in this Court, they would be bound to respect and follow the decision of their own State Court in preference. If this Court should believe that the soil was in the plaintiff below, but there was a common right of fishery, for the reason above stated, the judgment should be in favor of the defendants below.

Mr. Ogden for the defendants in error.

There are two questions in this case : 1st. The extent of the grant of King Charles the Second. 2d. The operation and effect of the surrender in 1702, to Queen Anne.

The question whether the country, now the United States, was acquired by discovery or conquest, is of no moment in this case.

The question what passed to the Duke of York, by the letters patent, properly divides itself into two portions. 1. What was the thing granted. 2. Had the king the power to make the grant as it is construed by the defendants in error.

The grant is of all the lands, soils, rivers, &c., and of all other regaliities. "Soil" is the appropriate word to pass land under water. It is not a general term, but an apt and proper one to pass soil under a river ; and therefore when used, passed by the king's grant all that is the prerogative right of the king. It is to be holden by the Duke of York and his heirs, in fee-simple, in free and common soccage. Now, suppose the deed stopped here, would there be any doubt of its construction ? It then grants the powers of government, civil and military.

By the grant to the Duke of York, King Charles the Second parted with all the premises included within the grant, and also with all his rights of sovereignty or power of government, on condition, and so long as the laws made by the new government were not contrary to the laws of England ; reserving only a right of receiving and hearing appeals from provincial judgments and decrees or sentences. He parted with all his prerogative rights

in the territory contained in the grant : because having parted with the sovereign power, he must necessarily have parted with all the rights of sovereignty. He parted with his crown and with all the rights attached to it ; and he had no prerogative rights remaining in him, except those expressly reserved.

The Duke of York, and the proprietors of New Jersey under him, were seised and possessed of all the rights of the King of England, both of property and government.

This presents the point, had the king power to make such a grant ?

It seems to the counsel for the defendants in error, to be placing this question on too narrow a ground, to put the validity of this grant upon the king's prerogative rights. Those rights were, from their nature, and must be, confined to England.

This grant, parting not only with the soil, but with the government of the country granted by him, transcends all his prerogative rights under the common law of England. He, as king, cannot grant a right of sovereignty over any part of England. This right to part with and convey the property and sovereignty of government of this territory, must be traced to the great principles of national law ; applicable to every nation, to every sovereign in whom is the power of disposing of any property which the nation has acquired either by conquest or discovery. The correctness of this view of sovereign power must be judged of, not by the common law, but according to the law of nations.

It is considered a cession by a sovereign to one of his subjects, but it is intended to vest in that subject a territory with all the rights of government ; and it must be construed as if it were a cession to another sovereign. By the treaty of 1783, the King of Great Britain ceded all his right and sovereignty over the United States. Did not the rivers and the soil under them pass without apt and special words to include all his regalities ?

This was a newly acquired territory, then a wilderness ; the settlement and improvement of it were great objects with the crown. In order to effect this, it was intended to hold out great

inducements to Englishmen and others to come over and inhabit it. Self-government was always a favorite object with the people of England, who were strongly imbued with a love of liberty; and in furtherance of that object, this grant, and the power and property included in it, were made and granted by the king. The people were to be subject to their allegiance to the crown; but not to be subject to all the prerogatives vested in the king by the common law.

To a certain extent, this was a part of one and the same nation. The enemies of England, in time of war, were their enemies; and in time of peace, they were at peace with every nation with whom England was at peace. But to a great extent they were an independent government; making their own laws, holding treaties with the Indians, naturalizing citizens, and exercising full legislative authority; restrained only by the condition contained in the patent, with an exclusive power of taxing their inhabitants, &c.

To assert that they held all their rights, and exercised all their power subject to the common law prerogative of the King of England, would be contrary to common sense. To one prerogative, from their peculiar and anomalous situation, they were subject, the power of the king to declare war and to make peace; but to nothing else.

The exercise of the royal prerogative had in many cases been considered as leading to acts of tyranny in England; and to avoid being no longer within it, was no doubt one great inducement to many to leave that kingdom; and they never could believe that those prerogative rights were to follow them in their new homes.

In connection with this point in the argument, it is important to refer to dates.

The patent of Charles the Second to the Duke of York was dated on the 12th of March, 1664. The duke conveyed to Berkley and Carteret on the 24th of June, 1664. The concession and agreement made by Berkley and Carteret with all and every the

adventurers, and all such as shall settle or plant there, bears date the 10th of February, 1664.

If this was before the grant to the Duke of York, it is probable the concessions were known and approved of by the king before he made the grant to the duke. Whether, therefore, these grants, concessions, and agreements of Berkley and Carteret were made after or before the letters patent, is of no consequence.

By the twenty-fifth article of the concessions we find the proprietors acting and erecting a government of their own, with the knowledge and consent of the king, with three distinct departments, legislative, executive, and judicial; and free, it is apprehended, from all the common law prerogatives of the crown of England, and subject only to one great prerogative, that of making war and peace.

In confirmation of this doctrine, the Court are referred to *Sal-keld*, 666, where Lord Holt says, "The law of England does not extend to Virginia; her law is what the king pleases." In the opinion of Lord Holt, the power of the king was unlimited; restrained, or governed by no principle of the common law. He had a right, then, to grant New Jersey without any reference to the laws of England, or to his prerogatives under those laws. He could give no stronger evidence of his pleasure than by the words of the grant made by him to the Duke of York.

But if this case is to be determined according to the strictest and most technical rules of the common law, let us now examine that law, and see what will be the result upon the questions in this case.

It is contended by the counsel for the plaintiffs in error, that the prerogative rights of the king to rivers, in which the tide ebbs and flows, to the bays and inlets from the sea, to the soil under the rivers, and to the fisheries, are held by him in trust for the use of all his subjects; and cannot be transferred by him to an individual. If these were the trusts upon which the king held these rights, it is presumed that the State of New Jersey must now hold them upon the same trusts. By the Revolution, the

State acquired all the rights which belonged to the crown, but none others. If the king held all the rights upon the trusts mentioned, the State must hold them upon the same trusts.

But by the legislation of New Jersey, all such trusts are denied. Acts of the legislature of New Jersey of November 24, and December 27, 1818. These acts authorize the leasing of those flats, or land, or soil under the water to any individual, and not to the riparian owners of the soil only, but to any one who shall pay the State a certain annual rent; and have actually leased to the plaintiffs in error the premises in dispute for a term of years, none of whom are stated to be the owners of the adjacent shores.

If the legislature of New Jersey have the power to lease for years, they may do so for life or in fee. So long as they have the power to convey any interest or estate in the premises to individuals, the nature and continuance of the estate to be conveyed or granted must depend entirely and exclusively on the legislative discretion.

By what course of reasoning do the counsel for the plaintiffs in error arrive at the conclusion, that the State have now the power to make a disposition of this property for private purposes, and that the crown anterior to the Revolution had no such power or right.

It is not intended to consume the time of the Court by reading the cases referred to in the argument already addressed to the Court by the counsel for the defendants in error. The principles contained in these authorities will be stated. All rivers, bays, which are what are called arms of the sea, in which the tide ebbs and flows, and the soil under them below high-water mark, and the rights of fisheries in these rivers, *primâ facie*, belong to the king. They may, however, belong to a subject; but he must show his title to them. He may show either an actual grant, or he may show a title by prescription, which always supposes a grant.

A grant from the king of a river, and the soil under it, passes

a right of fishery to the grantees. It was, for some time, made a question, whether there could be a several right of fishery without the ownership of the soil ; all the cases on that subject necessarily admit that the right of soil under the river may be vested in an individual. There are but two cases from which a contrary doctrine can be deduced. They are the cases in 6 Modern, 73, and 5 Rob. Adm. Rep. 159. But this Court, it is confidently believed, will not suffer these two cases to overrule the mass of authorities cited for the defendants in error, nor the authority of Sir Matthew Hale, one of the most learned and accurate lawyers that ever lived.

To proceed to the second point ; what rights were surrendered by the proprietors to the crown, by the deed of surrender of 1702 ?

It will be recollected that the original grant from Charles the Second was not only of the property, but of the government of the territories granted. All civil and military power was granted.

In 1702, the proprietors surrendered their right of government, and nothing else ; whatever was a right of property was retained by them. Whatever was necessary for the government, was surrendered by them.

Certainly the surrender never intended to abandon any of the property, and to enable the queen to grant it. It has been shown that the property in the soil was granted to those who held under the letters patent of Charles the Second, as property. It is, then, evident, that it never was surrendered to the crown. If it never was granted as property, but was a part of the powers of government necessarily appertaining to it, then it was not surrendered. As has been shown by the cases cited, the soil under a river may be granted by the crown to a subject, and the government still goes on. This fully establishes the position that the retaining such property in the crown is not necessary to the existence and administration of the government.

The proprietors exercised privileges which are essential to every government. They established forts. A fort was erected

at Amboy. They continued after the surrender to use and exercise all rights of property in the territory for its protection and for their advantage. This is not a case of local law, and the decisions of the Courts of New Jersey are not entitled to authority in the Courts of the United States, as they would be on the construction of the statutes of New Jersey. This Court will look at these decisions with respect, but will not yield to them the decision of the question before the Court. The Court are now called upon to give a construction to a patent from the King of England, which related to territory as well within the limits of what is now New York, as New Jersey. This is not a local question.

For the construction the Court are now called upon to give to these letters patent, they will look at the interpretation given to them in West Jersey. The people of that part of the territory granted by the letters patent, have always used the right of fishery in the river Delaware. This right has been derived from grants of the proprietors of West Jersey.

Mr. Wright, for the defendants in error.

The following is a concise statement of the facts of the case. An action of ejectment was instituted in the Circuit Court of the United States for the district of New Jersey, by the defendant in error, to try the title to land covered with water, situated in the bay of Amboy, near the mouth of the Raritan river. The defendant in error, being plaintiff below, obtained a judgment in the Circuit Court, on a special verdict; and this writ of error was prosecuted by the defendants.

In the Circuit Court, the plaintiffs in the ejectment claimed title under a patent from King Charles the Second of England, to his brother James, then Duke of York, executed 12th March, 1664, by which the whole of the territory now the State of New Jersey, including the premises in question, with other large bodies of land, were granted to the Duke of York. By conveyances from the Duke of York and others, the property was claimed to be vested in the defendant in error. The patent describes the land

in the usual form of such conveyances from the crown of England, without any exceptions or reservations, with certain islands upon the sea-coast, "and the lands from the west side of Connecticut river to the east side of the Delaware bay."

This was the grant of property from the king to the duke, and it is not questioned that the mesne conveyances from the duke down to the plaintiff in the ejectment have been equally broad and comprehensive to carry the title to the premises in question. In a subsequent part of the patent, full powers of government, civil and military, in and over the territory, are granted to the duke, "his heirs, deputies, agents, and assigns," reserving only an appeal to the king in favor of any person "touching any judgment or sentence to be by them made or given."

On the 15th of April, 1702, the twenty-four proprietors of East New Jersey, "assignees of the Duke of York," surrendered to Anne, then Queen of England, the powers of government granted in the patent from the king, which surrender was made in the very terms of the grant, in the patent; and that surrender so made, was accepted by the queen two days after it was made.

Under this state of facts, not controverted, the questions in this case are made :

First. Could the King of England, in conformity with the law of nations and the laws of England, convey, in the year 1664, to a subject of his realm a valid title to lands covered by the water of bays, rivers, or arms of the sea, where the tide ebbs and flows, in the province of New Jersey ?

The laws of nature and nations establish the following propositions, pertinent to this question :

1. Every nation is the proprietor as well of the rivers and seas as of the lands within its territorial limits. Vattel's Law of Nations, 120, sec. 266.

2. The sea itself, to a certain extent, and for certain purposes, may be appropriated and become exclusive property as well as the land. Vattel, 127, sec. 287 ; Rutherford, book 1, ch. 5, p. 76, sec. 3.

3. The nation may dispose of the property in its possession as it pleases; may lawfully alienate or mortgage it. Vattel, 117, sec. 261, 262.

4. The nation may invest the sovereign with the title to its property, and thus confer upon him the rights to alienate or mortgage it. Vattel, 117, sec. 261, 262.

The laws of England establish the following propositions material to this point: 1st. The common law of England vests in the king the title to all public property. 1 Black. Com. ch. 8, 298, 299; 2 Black. Com. 15, 261, 262; Hargrave's Law Tracts, *De Jure Maris*, ch. 4, 10, 11, 12; 6 Com. Dig., title Prerogative, 60; b. 63, Tenure, 337; 5 Com. Dig., title Navigation, 107; 3 Coke's Reports, 5, 109.

2. A subject may acquire the property of navigable rivers and the soil, and of specific localities in the sea itself, by grant or prescription, as he may many other prerogative rights of the king of a like character; and the king may make all these grants to a subject. Hargrave's Law Tracts, *De Jure Maris*, ch. 4, 11, 13, ch. 5, 17, 18; *Palmer v. Mulligan*, 3 Caines's Rep. 315, 319; *The People v. Platt*, 17 Johns. Rep. 195.

The Massachusetts cases equally recognise the authority of the law tracts in that State. So, too, are the decisions in other States. 1 Pick. Rep. 180; 2 Conn. Rep. 481; 2 Binney's Rep. 475.

As it has been said that no grants of navigable rivers, and the soils and fisheries thereof, have been made since Magna Charta, the following references are made. Darr. Rep. 155; *Donegal v. Hamilton*, 3 Ridgeway's Parliamentary Cases, 276-328.

Other authorities of English elementary authors, and English adjudged cases, sustain Lord Hale in the positions that the subject can acquire these rights, and that the king has a right to make the grants, and has been accustomed to make them. 1 Black. Com. 286; 5 Cruise's Dig. 45, sec. 10, tit. 54, King's Grant; 3 Cruise's Dig. 262; *Carter v. Murcat*, 4 Burr. Rep. 2163; S. C. 2164, 2165, 1 Mod. Rep. 105; 5 Com. Dig. 108, tit. Navigation, 6 Com. Dig. 55, tit. Prerogative; 4 Coke's Rep. part 7, p. 19;

Ballbrook v. Gooden, 2 Burr. 1768. All the following authorities of a date later than the publication of Hargrave's Tracts give to them the highest authority. The Banker's Case, Skinner's Rep. 601; *The Mayor of Orford v. Richardson*, 4 Durnford and East, 439; 5 Burr. 285; 5 Modern, 556; 3 Barn. & Cress. 875; 2 Bos. & Pull. 572; 5 Barn. & Cress. 268. American cases sustain the right of the king to make such grants. 2 Binney's Rep. 476; 4 Mass. Rep. 144, 522; 1 Pick. 180; 3 Johns. Rep. 357; 6 Johns. 131; 17 Johns. 195; 20 Johns. 90; 1 Conn. Rep. 284; 7 Conn. Rep. 486; 2 Conn. Rep. 481; 1 Har. & M'Hen. Rep. 564; 8 Wheat. 577-597.

Mr. Wright proceeded to examine the cases cited for the plaintiffs in error in support of the principles contended for by them. He argued that none of these cases impugned the doctrine he had claimed. Some of the cases were taken from the civil, and not from the common law, to which only the parties must look for the principles to govern the controversy. The difference between the civil and common law rights, and between the common law and the civil law, are laid down by Bracton. Barn. & Cress. 290, 292, 293, 309, 311.

Blackstone (2 Black. Com. 39) supposes that Magna Charta, ch. 16, had restrained the king from granting free fishery; by which he evidently intends "exclusive fishery, in navigable waters, when the soil is in the king;" but he says it is different as to several fishery, because that must either be in, or be derived from the owner of the soil.

The kings of England, then, had the right, by the laws of nations and the laws of England, at least until the statute of 1 Anne, in the year 1701, to grant in fee, to a subject, the crown lands and various royal franchises, portions of the property and inheritance of the crown, within the realm; and the subject could take, hold, possess, and enjoy, in full propriety, according to the grant, the lands and franchises so conveyed to him by the sovereign.

It cannot surely be necessary to resort to argument or authority to prove that the power of the king to make grants to his sub-

jects, either of lands or franchises, in the waste and wilderness province of New Jersey, in 1664 or 1674, was at least as extensive as the power he then possessed to make similar grants within the realm of England.

Still it has been objected that the title of the defendant in error is not sustained by these authorities, and the principles they establish; because it is said the power of the king to grant is confined to the alienation of his private property, "his ordinary revenue," "lands vested in him upon feudal principles," and does not extend to the public property, to property held "by virtue of his prerogative," in which way only it is alleged he holds "the allodium of the soil of navigable rivers and the sea." The authorities already cited answer this objection.

All the cases establish the power of the king to make the grant, or the right of the subject to hold by prescription, which presupposes a grant from the crown as the only lawful commencement of the title. Cited, 3 Cruise's Dig. 244, tit. Franchise, sec. 1; 5 Cruise, 46, tit. King's Grant, sec. 7; 2 Black. Com. 265; 4 Burr. Rep. 2165.

This objection, however, has no foundation in the English common law, but is entirely subversive of one of its oldest and best settled principles. The king holds nothing as "private property," but every thing in *jure coronæ*. Even that which was his private property before he was king, the moment the crown descends upon him, is held *jure coronæ*, and not as his private property. 6 Comyn's Dig. 60, tit. Prerogative, (D. 64); Skinner's Rep. 603.

A second objection is, that by chapters 16 and 23 of the statute of Magna Charta, adopted by the king and parliament of England in the ninth year of the reign of Henry the Third, A. D. 1224-5, the power of the king to grant the soil of navigable rivers, ports, havens, and arms of the sea, was restrained, and the exercise of it as to new grants entirely prohibited, so that any such grants, made subsequent to that statute, are contrary to its provisions, and therefore void.

This objection admits of several very conclusive answers; but the one which seems to present itself as first in order, as if sound it must be in importance, is

1. That neither of these chapters of Magna Charta relate, at all, to the title of the soil upon which they act, or contain any prohibition whatever against grants of soil anywhere, either by the sovereign, or a subject. They merely, in the broadest construction which any one has sought to give to them, prescribe and restrain the use of the soil of the banks and beds of rivers, as it relates to obstructions to navigation and fishing; and that equally whether the propriety of that soil be in a subject, or in the king.

This position will not be obviated, if the Court shall be of the opinion that, by virtue of these statutes, a common right of fishery in the waters which cover the premises in question was secured to all the subjects of the king, and has passed to the people of the State of New Jersey; because the plaintiffs in error do not defend under any such claim of common right, but under a title in the State of New Jersey, adverse to the title of the defendant in error, and by virtue of which they claim a several fishery, the right to put the waters and banks in defence, to put down weirs thereon, not obstructing the navigation, and to exclude, for a term of years, all the other inhabitants of New Jersey from taking fish there.

2. Another answer to this objection is, that Magna Charta is a mere statute, and its application was local and confined to the realm of England, for which the Parliament which passed it was the local legislature, unless subsequently expressly extended to the colonies by competent authority.

1. This is shown upon the face of the statute itself. The preamble contains this language. Cited Coke's Institutes, part 1, vol. 1, p. 1, English ed. 1817.

In order further to show the proper construction of the sixteenth chapter of Magna Charta, Mr. Wright also cited 2 Black. Com. 39; Cruise's Digest, 261, title Franchise; *Duke of Somerset v.*

Fogwell, 2 Barn. & Cress. 875 ; 1 Statutes of Great Britain and Ireland, 579, 718 ; 2 ib. 213, 242, 644, 688 ; 7 Coke's Rep. part 13, p. 35, 86.

It is believed that both the objections above enumerated are effectually disposed of by the considerations and authorities presented, and that the proposition before arrived at is fully established, viz : "That the King of England had the right, by the laws of nations, and the laws of England, at least until the statute of 1 Anne, in the year 1701, to grant in fee, to a subject, the crown lands, and various royal franchises, portions of the property and inheritance of the crown, within the realm ; and the subject could take, hold, possess, and enjoy in full propriety, according to the grant, the lands and franchises, so conveyed to him by the sovereign."

This Court has adopted these principles, as to the power of the king over his distant and conquered dominions ; and has applied them to the American colonies, especially so far as they relate to grants of the soil of this country, in a great variety of decisions. One of the leading cases, if not the most so, is that of *Johnson v. M^r Intosh*, in which the opinion of the Court was pronounced by the late Chief Justice Marshall. *Johnson v. M^r Intosh*, 8 Wheat. Rep. 543, 573, 574, 595, 597.

Whatever then may have been, or may be the power of the King of England to grant lands within the realm, it is believed the main question with which this argument commenced may now be safely answered. That the King of England, in conformity with the laws of nations and the laws of England, could convey, in the year 1664, to a subject of his realm a valid title to lands covered by the water of bays, rivers, and arms of the sea, where the tide ebbs and flows, in the then province of New Jersey ; and that the Courts of the United States cannot, according to the well-established principles of the laws of nations, of the laws of England, and of the laws of the United States, as applicable to grants of land within the United States, pronounce such a conveyance void, for the want of constitutional and legal power in the king to make the grant.

Second. The next question is, do the letters patent from the king to the Duke of York, found in the special verdict, in fact convey the premises claimed by the defendant in error; and to recover which this action is brought.

This inquiry must be answered principally from the letters patent themselves, and in them are found the following grants.

Mr. Wright read the charter from King Charles the Second to the Duke of York, as set forth in the special verdict; and cited on the construction of the charter, 2 Black. Com. 346, 347, 348; 7 Conn. Rep. 186; *Palmer v. Hicks*, 6 Johns. Rep. 133; 7 Conn. Rep. 198, 200.

These letters patent, then, do convey to the Duke of York the premises in question in this suit, so far as the propriety thereof was vested in the king at the time of the grant. Under these letters patent, the Duke of York took and held the territory described and conveyed unto him in the same year, when he assigned and transferred the same to Lord Berkley and Carteret. They thus became the owners of the property and government, and exercised all their rights in the same. Mr. Wright then referred to the grants to the purchasers from Lord Berkley and Carteret, as stated by the jury, and to the proceedings of the twenty-four proprietors of East Jersey, after they became the owners of the territory and government. He cited *Leaming and Spicer*, 77, 138, 153, 227, 362.

Third. Did this surrender to the Queen of England include, and carry with it, a surrender by the proprietors who made it, of the propriety of the soil covered by the waters of the navigable rivers, bays, ports, havens, and arms of the sea, within the territory granted to them under the letters patent from King Charles the Second?

1. Does the deed of surrender, upon its face, reconvey the title to, and property in that part of the territory of New Jersey in which the premises are situated? By a reference to the charter, it will be seen that the powers of government were granted by a different instrument from that of the grants of the soil and the

appurtenances to it. The two classes of grants are in nowise connected. Leaming and Spicer, 609 to 615.

No construction of the language employed in these patents can be adopted, which by fair legal interpretation can be made to amount to a conveyance of a single item of the property granted in the first letters patent.

It is denied that the grantors in the deed of surrender intended to surrender and reconvey to the crown any of the rights of soil or of property conveyed to them by the letters patent of King Charles the Second. This is shown by the terms of the surrender. Leaming and Spicer, 588, 589, 590, 593, 594, 596, 613, 619.

The residue of the argument of Mr. Wright was upon questions arising on the charter and surrender, on which no opinion was given by the Court; and this part of the argument is, therefore, omitted. The opinion of the Court was upon the power of the king to grant the soil as claimed under the charter, by the defendant in error, holding under the twenty-four proprietors of East Jersey, as the grantees under the Duke of York.

The last question for consideration is on the effect of the decision of the Supreme Court of New Jersey, in the case of *Arnold v. Mundy*, reported in 1 Halsted's Reports, 1. Does that decision bind this Court in the present case?

The principal cases in which this question has been raised and considered or decided in this Court, are the following: *M'Kean v. Delancy*, 5 Cranch, 82; *Polk v. Wendal*, 9 Cranch, 87; *Thatcher v. Powell*, 6 Wheat. 119; *Blight v. Rochester*, 7 Wheat. 535; *Daly v. James*, 8 Wheat. 495; *Elmendorf v. Taylor*, 10 Wheat. 152; 11 Wheat. 361; 12 Wheat. 153; 1 Peters, 571.

The principles deducible from these decisions, and which are to govern the application of the rule, would seem to be the following:

1. That the point presented to this Court, and upon which its decision is invoked, shall be identical in substance and in law with the point presented to, and decided by the State Courts, whose decisions are relied upon as being the guide to this Court.

2. The point must arise upon the construction of a legislative act of the State, whose Courts have given the construction relied upon; or as to what is the local law of that State, relating to the title to real property in the given case.

3. The decision of the State Court upon the point presented, must have remained so long, and have been so uniform, as to authorize the presumption of acquiescence on the part of the people and authorities of the State, and to have made the decisions of these Courts upon that point a settled and established rule of law, as to titles to lands within the State.

Mr. Wright then went into a particular examination of the case of *Arnold v. Mundy*, and contended that the decision did not come, in any manner, within the principles he had stated, and which are sustained by the cases referred to. In this examination he cited Hargrave's Law Tracts, *De Jure Maris*, ch. 1, p. 5; 1 Mod. 105.

Upon this point, after the examination of the case, he said :

For each and all of these reasons, the decision of the Supreme Court of New Jersey in the case of *Arnold v. Mundy*, cannot be considered as establishing a rule of law as to real property in that State, binding upon this Court in the decision of this cause. *Wilkinson v. Leland et al.*, 2 Peters, 656; *Hind and Wife v. Vattier*, 5 Peters, 401. After the analysis of the report of that case, which has been before made, it is believed that this Court will follow the rule laid down in these two cases, and say that the Circuit Court of New Jersey, in the case in question, was bound to decide, as the State Courts ought to have decided the same great questions, when presented to them for decision. In that case, the rules of the English common law, and not those of the civil law, will be the guide to a decision here.

Mr. Chief Justice TANEY delivered the opinion of the Court.

This case is brought here by writ of error from the Circuit Court of the United States, for the district of New Jersey. It was fully argued at the last term. But it was not then decided,

because the important principles involved in it, made it proper that the case should be heard and determined by a full Court; and as some of the justices were not present at the former hearing, a re-argument was ordered. In pursuance of this order, it has been again elaborately discussed by counsel; and having been carefully considered by the Court, I am instructed to deliver their opinion.

The questions before us arise upon an action of ejectment, instituted by the defendant in error, who was the plaintiff in the Court below, to recover one hundred acres of land, covered with water, situated in the township of Perth Amboy, in the State of New Jersey. At the trial in the Circuit Court, the jury found a special verdict, setting forth, among other things, that the land claimed lies beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows. And it appears that the principal matter in dispute, is the right to the oyster fishery in the public rivers and bays of East New Jersey.

The plaintiff makes title under the charters granted by Charles the Second to his brother the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on this continent. The last-mentioned grant is precisely similar to the former in every respect, and was made for the purpose of removing doubts which had then arisen as to the validity of the first.

The boundaries in the two charters are the same, and they embrace the territory which now forms the State of New Jersey. The part of this territory known as East New Jersey, afterwards, by sundry deeds and conveyances, which it is not necessary to enumerate, was transferred to twenty-four persons, who were called the proprietors of East New Jersey; who by the terms of the grants were invested, within the portion of the territory conveyed to them, with all the rights of property and government which had been originally conferred on the Duke of York by the letters patent of the king. Some serious difficulties, however, took place in a short time between these proprietors and the British authorities; and after some negotiations upon the subject,

they, in 1702, surrendered to the crown all the powers of government, retaining their rights of private property.

The defendant in error claims the land covered with water, mentioned in the declaration, by virtue of a survey made in 1834, under the authority of the proprietors, and duly recorded in the proper office. And, if they were authorized to make this grant, he is entitled to the premises as owner of the soil, and has an exclusive right to the fishery in question. The plaintiff in error also claims an exclusive right to take oysters in the same place; and derives his title under a law of the State of New Jersey, passed in 1824, and a supplement thereto, passed in the same year.

The point in dispute between the parties, therefore, depends upon the construction and legal effect of the letters patent to the Duke of York, and of the deed of surrender subsequently made by the proprietors.

The letters patent to the duke included a very large territory, extending along the Atlantic coast from the river St. Croix to the Delaware bay, and containing within it many navigable rivers, bays, and arms of the sea; and after granting the tract of country and islands therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments to the said several islands, lands, and premises belonging and appertaining with their and every of their appurtenances, and all the estate, right, title, interest, benefit, and advantage, claim, and demand of the king, in the said land and premises;" the letters patent proceed to confer upon him, his heirs, deputies, agents, commissioners, and assigns, the powers of government, with a proviso that the statutes, ordinances, and proceedings, established by his authority, should "not be contrary to, but as nearly as might be, agreeable to the laws, statutes, and government of the realm of England; saving also an appeal to the king, in all cases, from any judgment or sentence which might be given in the

colony, and authorizing the duke, his heirs and assigns, to lead and transport out of any of the realms of the king to the country granted, all such and so many of his subjects or strangers not prohibited, or under restraint, who would become the 'loving subjects' of the king, and live under his allegiance, and who should willingly accompany the duke, his heirs and assigns."

The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned. But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown in the country discovered by its subjects, on this continent; and the principles upon which it was parcelled out and granted.

The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. The grant to the Duke of York, therefore, was not of lands won by the sword; nor were the government or laws he was authorized to establish intended for a conquered people.

The country mentioned in the letters patent, was held by the king in his public and regal character as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public

domains ; and upon these principles rest the various charters and grants of territory made on this continent. The doctrine upon this subject is clearly stated in the case of *Johnson v. M^r Intosh*, 8 Wheat. 595. In that case the Court, after stating it to be a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say, that " If the discovery be made and possession taken under the authority of an existing government which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the benefit of the whole nation ; and the vacant soil is to be disposed of by that organ of the government, which has the constitutional power to dispose of the national dominions ; by that organ, in which all territory is vested by law. According to the theory of the British constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognised in America as in the island of Great Britain."

This being the principle upon which the charter in question was founded, by what rules ought it to be construed ?

We do not propose to meddle with the point which was very much discussed at the bar, as to the power of the king, since *Magna Charta*, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot perhaps be altogether reconciled. But from the opinions expressed by the justices of the Court of King's Bench, in the case of *Blundell v. Catterall*, 5 Barn. and Ald. 287, 294, 304, 309 ; and in the case of *The Duke of Somerset v. Fogwell*, 5 Barn. & Cress. 883, 884, the question must be regarded as settled in England against the right of the king, since *Magna*

Charta, to make such a grant. The point does not, however, arise in this case, unless it shall first be decided that in the grant to the Duke of York the king intended to sever the bottoms of the navigable waters from the prerogative powers of government conferred by the same charter; and to convert them into mere franchises in the hands of a subject, to be held and used as his private property. And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation.

Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly—and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays, and arms of the

sea, and all prerogative rights within the limits of the charter, undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters patent. The words used evidently show this intention; and there is no room, therefore, for the application of the rule above mentioned.

The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke. Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals, for his own benefit. And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

It is said by Hale, in his Treatise *De Jure Maris*, Harg. Law Tracts, 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, "that although the king is the owner of this great coast, and, as a consequent of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty."

The principle here stated by Hale, as to "the public common of piscary" belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed, is, whether since Magna Charta, "either the king or any particular subject can gain a propriety exclusive of the common liberty." For, undoubtedly rights of fishery, exclusive of the common liberty, are at this day held and enjoyed by private individuals under ancient grants. But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public. And there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the crown, but not all of them, general words are used, conveying "all the estate, right, title, interest, benefit, advantage, claim, and demand" of the king in the lands and premises before granted. The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a preroga-

tive right, passed to the duke in the same character. And if the word "soils" be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with "other royalties," and conveyed as such. No words are used for the purpose of separating them from the *jura regalia*, and converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances, to the laws and statutes of England; and how could this be done, if in the charter itself this high prerogative trust was severed from the regular authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke for his own individual emolument? There is nothing, we think, in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown.

This opinion is confirmed by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic coast, were granted by different monarchs of the Stuart dynasty to different persons, for the purposes of settlement and colonization, in which the powers of government were united

with the grant of territory. Some of these charters very nearly resembled in every respect the one now in controversy ; and none of them, it is believed, differed materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantees. Yet, in no one of these colonies has the soil under its navigable waters, and the rights of fishery for shell-fish or floating fish, been severed by the letters patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise ; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property ; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement, conformed to the practice of the other chartered colonies. And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away. But we see nothing in the charter to require this conclusion.

The same principles upon which the Court have decided upon the construction of the letters patent to the Duke of York, apply with equal force to the surrender afterwards made by the twenty-

four proprietors. It appears by the special verdict, that all the interest of the duke in East New Jersey, including the royalties and powers of government, were conveyed to these proprietors, as fully and amply and in the same condition as they had been granted to him ; and they had the same dominion and propriety in the bays, and rivers, and arms of the sea, and the soil under them, and in the rights of fishery, that had belonged to him under the original charter. In their hands, therefore, as well as in those of the duke, this dominion and propriety was an incident to the regal authority, and was held by them as a prerogative right, associated with the powers of government. And being thus entitled, they, in 1702, surrendered and yielded up to Anne, Queen of England, and to her heirs and successors, "all the powers and authorities in the said letters patent granted, to correct, punish, pardon, govern, and rule all or any of her majesty's subjects or others, who then were inhabitants, or thereafter might adventure into or inhabit within the said province of East New Jersey ; and also to nominate, make, constitute, ordain, and confirm any laws, orders, ordinances, directions, and instruments for those purposes, or any of them ; and to nominate, constitute, or appoint, revoke, discharge, change, or alter any governor or governors, officers or ministers, which were or should be appointed within the said province ; and to make, ordain, and establish any orders, laws, directions, instruments, forms, or ceremonies of government and magistracy, for or concerning the same, or on the sea, in going to or coming from the same ; or to put in execution, or abrogate, revoke, or change such as were already made, for or concerning such government, or any of them ; and also all the powers and authorities by the said letters patent to use and exercise martial law in the said province of East New Jersey ; and to admit any person or persons to trade or traffic there ; and of encountering, repelling, and resisting by force of arms, any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns ; and all other the powers, authorities, and privileges of and con-

cerning the government of the province last aforesaid, or the inhabitants thereof, which were granted or mentioned to be granted by the said several above-recited letters patent, or either of them;" which said surrender was afterwards accepted by the queen.

We give the words of the surrender as found by the special verdict, and they are broad enough to cover all the *jura regalia* which belonged to the proprietors. They yield up "all the powers, authorities, and privileges of and concerning the government of the province;" and the right in dispute was one of these authorities and privileges. No words are used for the purpose of withholding from the crown any of its ordinary and well-known prerogatives. The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the hands of the Duke of York. Whatever he held as a royal or prerogative right, was restored, with the political power to which it was incident. And if the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them, were to have been severed from the sovereignty, and withheld from the crown; if the right of common fishery for the common people, stated by Hale in the passage before quoted, was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language.

The negotiations previous to the surrender have been referred to, in order to influence the construction of the deed. But whatever propositions may have been made, or opinions expressed before the execution of that instrument, the deed itself must be regarded as the final agreement between the parties; and that deed, by its plain words, re-established the authority of the crown, with all of its customary powers and privileges. And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the

crown or the parliament, became immediately and rightfully vested in the State.

This construction of the surrender is evidently the same with that which it received from all the parties interested at the time it was executed. For it appears by the history of New Jersey, as gathered from the acts, documents, and proceedings of the public authorities, that the crown and the provincial government established by its authority always afterwards in this territory, exercised the same prerogative powers that the king was accustomed to exercise in his English dominions. And, as concerns the particular dominion and propriety now in question, the colonial government from time to time authorized the construction of bridges with abutments on the soil covered by navigable waters; established posts; authorized the erection of wharves; and, as early as 1719, passed a law for the preservation of the oyster fishery in its waters. The public usages, also, in relation to the fisheries continued to be the same. And from 1702, when the surrender was made, until a very recent date, the people of New Jersey have exercised and enjoyed the rights of fishery, for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors. The few unimportant grants made by them at different times running into the navigable waters, which were produced in the argument, do not appear to have been recognised as valid by the provincial or State authorities, nor to have been sanctioned by the Courts. And the right now claimed was not seriously asserted on their part, before the case of *Arnold v. Mundy*, reported in 1 Halsted, 1; and which suit was not instituted until the year 1818; and, upon that occasion, the Supreme Court of the State held, that the claim made by the proprietors was without foundation.

The effect of this decision by the State Court, has been a good deal discussed at the bar. It is insisted by the plaintiffs in error that, as the matter in dispute is local in its character, and the controversy concerns only fixed property, within the limits of New Jersey, the decision of her tribunals ought to settle the construc-

tion of the charter ; and that the Courts of the United States are bound to follow it. It may, however, be doubted, whether this case falls within the rule, in relation to the judgments of State Courts when expounding their own constitution and laws.

The question here depends, not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British crown ; under which certain rights are claimed by the State, on the one hand, and by private individuals, on the other. And if this Court had been of opinion that upon the face of these letters patent, the question was clearly against the State, and that the proprietors had been deprived of their just rights by the erroneous judgment of the State Court ; it would, perhaps, be difficult to maintain that this decision of itself bound the conscience of this Court. It is, however, unquestionably entitled to great weight. It confirms the construction uniformly placed on these charters and instruments, by the other public authorities ; and in which the proprietors had so long acquiesced. Public acts and laws, both of the colonial and State governments, have been founded upon this interpretation ; and extensive and valuable improvements made under it. In the case referred to, the sanction of the judicial authority of the State is given to it. And if the words of the letters patent had been far more doubtful than they are, this decision, made upon such a question, with great deliberation and research, ought, in our judgment, to be regarded as conclusive.

Independently, however, of this decision of the Supreme Court of New Jersey, we are of opinion that the proprietors are not entitled to the rights in question ; and the judgment of the Circuit Court must, therefore, be reversed.

Mr. Justice Thompson, and Mr. Justice Baldwin, dissented.

Mr. Justice THOMPSON.

The premises in question in this case are a mud-flat covered by the waters of the bay of Amboy, in the State of New Jersey. The cause comes up on facts found by a special verdict in the

Court below ; by which it appears that the lessors of the plaintiff produced upon the trial a regular deduction of title from Charles the Second down to themselves, and the premises in question are admitted to be within the grant. And the general question in the case is, whether this mud-flat passed under the grant, and, in virtue of the several conveyances set out in the special verdict, became vested in the proprietors of New Jersey as private property. The opinion of a majority of the Court is against this right ; in which opinion, however, I cannot concur, and shall briefly assign the reasons upon which my opinion rests.

Some objections have been made to the right of maintaining an action of ejectment, growing out of the nature of the subject-matter in controversy. There can be no grounds for such an objection. The subject in question is the right to land, and not to water. It is the ordinary case of an ejectment for land covered with water, and the premises are so set out and described in the declaration ; and the special verdict finds that the lessors of the plaintiff, under the title by them shown, entered into the tenements with the appurtenances in the declaration mentioned, and was thereof possessed until the defendant afterwards entered upon, and ejected, expelled, and removed the plaintiff from such possession. So that the subject-matter in controversy is found not only to be susceptible of actual possession, but to have been so possessed and enjoyed.

A majority of the Court seem to have adopted the doctrine of *Arnold v. Mundy*, decided in the Supreme Court of New Jersey, 1 Halst. 1, in which it is held, that navigable rivers, where the tide ebbs and flows, and the ports, bays, and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey ; and that, under the grant of Charles the Second to the Duke of York, all the rights which they call royalties passed to the duke as governor of the province, exercising the royal authority, and not as proprietor of the soil ; but that he held them as trustee for the benefit of all settlers in the province, and that the proprietors did not acquire any such

right to the soil; that they would grant a several fishery; and that no person who plants a bed of oysters in a navigable river, has such property in the oysters as to enable him to maintain an action of trespass against any one who encroaches upon it. And this rests on the broad proposition, that the title to the land under the water did not, and could not, pass to the Duke of York, as private property. To maintain this proposition, it must rest on the ground that the land under the water of a navigable river is not the subject of a private right; for if it can be conveyed by words, the grant in the present case is broad enough to pass the title to the land in question.

It is worthy of observation, that the course of New Jersey in relation to this claim is hardly consistent with her pretensions. In the case of *Arnold v. Mundy*, the Chief Justice says, upon the Revolution, all these rights became vested in the people of New Jersey as the sovereign of the country, and are now in their hands; and the legislature may regulate them, &c. But the power which may be exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*,—the right of regulating, improving, and securing the same, for the benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people.

If this be the received doctrine in New Jersey in relation to the navigable waters of that State, and the oyster fisheries, they remain common to all the citizens of New Jersey, and never can be appropriated to any private or individual use, and all laws having such object in view must be utterly null and void; and it is difficult to perceive how the law of New Jersey, found by the special verdict, can be sustained. This act declares that the shore, and land covered with water, may be set apart and laid out by commissioners for the purpose of growing and planting oysters

thereon, reserving such parts as might be judged necessary for public accommodation; provided that nothing in the said act contained should authorize the commissioners to present any obstruction, or cause any injury to the navigation of the said sound and river, or to any fishery or fisheries therein. Here the legislature treat these flats in all respects as land, to be used for planting and growing oysters; and for the use of which a revenue is derived to the State, by the payment of a rent reserved. It is not the use of the water for any public purpose that this law contemplates; but an exclusive right to the use of the land under the water, in contradistinction to the use of the water for purposes of navigation; and that this law is so to be considered is manifest from the proviso, that no obstruction should be made to the fishery or fisheries therein; and here is a manifest distinction made between a fishery and an oyster-bed. For if it had been understood that the fisheries included oystereries, the enacting clause and the proviso would present a glaring inconsistency. The enacting clause authorizes the setting apart the oystery to exclusive private use, when by the proviso no obstruction is to be made to the fisheries. So that if an oystery is a fishery, the owner is deprived of the exclusive use of it. The act seems to be founded upon a distinction clearly held up in many cases to be found in the books, between an oystery and a fishery in the common use of the term. The one applying to the use of land under the water, which is peculiarly adapted to the growing of oysters, and to be used for that purpose in the cultivation of oysters, as other lands are used for the purpose to which they are particularly adapted. Whereas a fishery, in common acceptation, has reference to the use of the water for floating fish; and this is a very obvious and natural distinction.

That the title to land under a navigable stream of water must be held subject to certain public rights, cannot be denied. But the question still remains, what are such public rights? Navigation, passing and repassing, are certainly among those public rights. And should it be admitted that the right to fish for float-

ing fish was included in this public right, it would not decide the present question. The premises in dispute are a mud-flat; and the use to which it has been and is claimed to be applied is the growing and planting of oysters. It is the use of land, and not of water, that is in question. For the purpose of navigation, the water is considered as a public highway, common to all; like a public highway on land. If land over which a public highway passes is conveyed, the soil passes, subject to that use; and the purchaser may maintain an action for an injury to this soil not connected with the use; and whenever it ceases to be used as a public highway, the exclusive right of the owner attaches: so with respect to the land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public; the owner, nevertheless, retaining all the rights and benefits of the soil, that may not impede or interfere with the use as a public highway. Should a coal-mine, for instance, be discovered under such highway, it would belong to the owner of the soil, and might be used for his benefit; preserving, unimpaired, the public highway. So with respect to an oyster-bed, which is local, and is attached to the soil. It is not the water that is over the beds that is claimed; that is common, and may be used by the public; but the use of the soil by the owner, which is consistent with the use of the water by the public, is reserved to the owner. Suppose this mud-flat should, by the wash from the shore, or the receding of the water, or in any other manner be filled up and become solid ground — which is by no means an extravagant supposition — would not the proprietors be considered the owners of this land, and have the exclusive right to the use and enjoyment of it, if they had in no way parted with such right? This cannot be denied, if the soil passed to and became vested in the proprietors under the grant to them. It surely would not be claimed by the State, it being no longer susceptible of public use.

The case of *Brown v. Kennedy*, 5 Har. & Johns. 195, is fully to this point. The question there related to the right to the soil

in the bed of a navigable river, which had been diverted to a canal; and it was held, that the property in the soil covered by the water was vested in the lord proprietary, by the charter of Maryland; that by the common law, the right was in the king, and he might dispose of it *sub modo*; that the property in the soil may be granted, subject to the *jus publicum*; that by the terms of the charter to Lord Baltimore, they clearly passed the property in the soil covered by any waters within the limits of the charter; and if the bed of the river had not been conveyed away, it would have remained in the proprietary; and if an island had sprung up, it would have been his; or if the bed of the river had been left bare, it would be his, as the *jus publicum* would be destroyed.

The rules and principles laid down by Lord Hale, as we find them in Hargrave's Law Tracts, are admitted as containing the correct common law doctrine as to the rights and power of the king over the arms of the sea and navigable streams of water. We there find it laid down, that the King of England hath a double right in the sea, viz., a right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership. Hargrave, 10. The king's right of propriety or ownership in the sea and soil thereof, is evinced principally in these things that follow.

The right of fishing in the sea, and the creeks, and arms thereof, is originally lodged in the crown; as the right of depasturing is originally lodged in the owner of the coast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great coast, and as a consequent of his proprietary hath the primary right of fishing in the sea, and the creeks, and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some particular subject hath gained a

proprietary exclusive of that common liberty, (11). In many ports and arms of the sea, there is an exclusion of public fishing by prescription or custom (12), although the king hath *primâ facie* this right in the arms and creeks of the sea, *communi jure*, and in common presumption; yet a subject may have such a right in two ways.

1. By the king's charter or grant; and this is without question. The king may grant fishing within some known bounds, though within the main sea, and may grant the water and soil of a navigable river, (17); and such a grant (when apt words are used) will pass the soil itself; and if there shall be a recess of the sea, leaving a quantity of land, it will belong to the grantee. The second mode is by custom or prescription. There may be the right of fishing without having the soil, or by reason of owning the soil, or a local fishery that arises from ownership of the soil, (18). That, *de communi jure*, the right of the arms of the sea belong to the king; yet a subject may have a separate right of fishing exclusive of the king and of the common right of the subject, (20). But this interest or right of the subject must be so used as not to occasion a common annoyance to the passage of ships or boats; for that is prohibited by the common law, as well as by several statutes.

For the *jus privatum* that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use, (22)—as the soil of an highway, in which, though in point of property may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damaged, (36).

These rules, as laid down by Lord Hale, have always been considered as settling the law upon the subjects to which they apply, and have been understood by all elementary writers as governing rules, and have been recognised by Courts of justice as controlling doctrines. They establish, that by the common law the king is the owner of all navigable rivers, bays, and shores;

that he owns them in full dominion and propriety, and has full power and authority to convey the same; that he may grant a several fishery in a navigable stream, and the common law has annexed only two limitations upon this power,—that these waters shall remain highways for passage and navigation, and that whilst they remain ungranted, there is a common right of fishery in them; but, subject to these limitations, the king has as full power to convey, as an individual has to convey the land of which he is the owner.

I see nothing to countenance the distinctions set up, that the king holds these subjects as trustee, any more than he does the dry land; or that he cannot convey them, discharged of the right of common fishery. There is no reason for such distinction with respect to land under water. The true rule on the subject is, that *primâ facie* a fishery in a navigable river is common, and he who sets up an exclusive right, must show title either by grant or prescription. This is the doctrine of the King's Bench, in England, in the case in 4 Burr. 2163. It was an action of trespass for breaking and entering the plaintiff's close, called the river Severn; and the defence set up was, that it was a navigable river, and an arm of the sea, wherein every subject has a right to fish; and that an exclusive right cannot be maintained by a subject in a river that is an arm of the sea, but that the general right of fishing is common to all. But this doctrine was not recognised by the Court. Lord Mansfield said, the rule of law is uniform. In rivers not navigable the proprietors of the land have the right of fishing on their respective sides, and it generally extends *ad flum medium aquæ*. But in navigable rivers, the proprietors of the land on each side have it not. The fishery is common. It is *primâ facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right; though the presumption is against him, unless he can prove such a prescriptive right. Here it is claimed and found. It is therefore consistent with all the cases, that he may have an exclusive privilege

of fishing, although it is an arm of the sea, such a right shall not be presumed; but the contrary, *primâ facie*; but it is capable of being proved, and must have been so in the present case. And Yates, Justice, says, he was concerned in such a case, but the right was not proved, and so found common; but such a right may be proved. It may be appropriated by prescription; and he refers to the royal salmon fishery in the river Banne, in Sir John Davies's Reports, and says it is agreeable to this, and that it is a very good case. That it appears by it that the crown may grant a several fishery in a navigable river where the sea flows and reflows, or in the arm of the sea. And he refers to the case 1 Mod. 105, where, he observes, Lord Hale says truly, if any one will appropriate a privilege to himself, the proof lieth on his side. Now, if it may be granted, it may be prescribed for; for a prescription implies a grant.

In the argument of this case, the counsel on the part of the defendant referred to the case of *Warren v. Mathews*, as reported in 6 Mod. 73, where it is said, every subject of common right may fish with lawful nets, &c., in a navigable river, as well as in the sea, and the king's grant cannot bar them thereof; and this case has been much relied on in the argument of the case now before the Court. But this report of the case in 6 Mod. 73, is clearly a mistake. It is the only case to be found in which the broad proposition here stated is recognised, that the king's grant cannot bar the subject of the common right of fishing. And in the report of the same case, 1 Salk. 357, the case as stated is, that one claimed *solam piscariam*, in the river Ex, by a grant from the crown. And, Nott, Chief Justice, said, the subject has a right to fish in all navigable rivers as he has to fish in the sea; and a *quo warranto* ought to be granted to try the title of this grantee, and the validity of his grant. Lord Nott, here, no doubt, meant to speak of the *primâ facie* right of the subject. For if he intended to say that no such exclusive right could be given by grant from the king, it would be absurd to issue a *quo warranto* to try the title and validity of the grant, if by no possibility a

valid grant could be made. At all events, it is very certain that the King's Bench, in the case of *Carter v. Murcot*, did not recognise the doctrine of *Warren and Mathews*, as reported in 6 Mod. 73. And under these circumstances, it is entitled to no weight in the decision of the case now before the Court.

It is unnecessary to refer to the numerous cases in the English books on this subject; the doctrine as laid down in the case of *Carter v. Murcot* is universally recognised as the settled law on the subject, and is fully adopted and sanctioned by the Courts of this country. Numerous cases of this description have come before the Courts in the State of New York, and the principles and rules as laid down in the case of *Carter v. Murcot* fully recognised and adopted. In the case of *James and Gould*, 6 Cowen, 376, the Court, in referring to that case, place the decision upon it, and say, "This is the acknowledged law of Great Britain and of this State; and cases are referred to showing such to be the settled law."

In the case of *Johnson v. M'Intosh*, 8 Wheat. 595, this Court say, that according to the theory of the British constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown as a branch of the royal prerogative. And this principle is as fully recognised in America as in Great Britain. All the lands we hold were originally granted by the crown. Our whole country has been granted; and the grants purport to convey the soil as well as the right of dominion to the grantee. Here the absolute ownership is recognised as being in the crown, and to be granted by the crown, as the source of all title; and this extends as well to land covered by water as to the dry land; otherwise, no title could be acquired to land under water. There is in this case no intimation that any of the lands are vested in the crown as trustee, but as absolute owner. If lands under water can be granted and are actually granted, the grantees must of course acquire all the right to the use and enjoyment of such lands of which they are susceptible as private property, as much

so as the dry land ; and there can be no grounds for any implied reservation of ungranted rights in the one case more than in the other ; and the grant of the soil carries with it, of course, all the uses to which it may be applied, among which is an exclusive or several fishery. All grants of land, whether dry land or covered with water, are for great public purposes, subject to the control of the sovereign power of the country. So the grant of the soil under water, which carries with it a several fishery, is subject to the use of the water for the public purposes of navigation, and passing and repassing ; but it is nowhere laid down as the law of the land, that a several fishery is a part of the *jus publicum*, and open to the use of the public. So long as the fishery remains ungranted, it is common, and may be used by the public ; but when granted to individuals, it becomes private property as much as any other subject whatever ; and I think the law is too well settled, that a fishery may be the subject of a private grant, to be at this day drawn in question.

If, then, according to the principles of the common law, the king had the power to grant the soil under the waters of a navigable stream, where the tide ebbs and flows ; and if such grant of soil carries with it the right of a several fishery, to the exclusion of a public use, the remaining inquiries are, whether the grant of Charles the Second to the Duke of York, in the year 1664, did convey the premises in question ; and if so, then, whether this right was surrendered by the proprietors of New Jersey to Queen Anne, in the year 1702.

This charter to the Duke of York is one containing not only a grant of the soil, but of the powers of government. This Court, in the case of *Johnson v. McIntosh*, in noticing the various charters from the crown, observe, that they purport to convey the soil and right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting the lands. Some of these charters

purport to convey the soil alone, and in those cases in which the powers of government as well as the soil are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant; and in some instances, even after the powers of government were revested in the crown, the title of the proprietors of the soil was respected. The Carolinas were originally proprietary governments; but in 1721 a revolution was effected by the people who shook off their obedience to the proprietors, and declared their dependence immediately on the crown, and the king purchased the title of those proprietors who were disposed to sell. Lord Carteret, however, who was one of the proprietors, surrendered his interest in the government, but retained his title to the soil; and that title was respected till the Revolution, when it was forfeited by the laws of war.

This shows the light in which these charters, granting the soil, were considered by this Court. That they conveyed an absolute interest in the soil, and passed every thing susceptible of private and individual ownership, of which a fishery is certainly one, according to the settled law, by the authorities I have referred to. Subject always, as before mentioned, to the *jus publicum*, or rights of navigation and trade; but of which the right of a common fishery forms no part, after the soil has been conveyed as private property.

It is unnecessary to notice particularly the various charters and mesne conveyances set out in the special verdict. It was admitted on the argument, that the premises in question fall within these conveyances; and vested in the proprietors of New Jersey all the right and title both of soil and the powers of government, which passed to the Duke of York under the charter of Charles the Second. The terms employed in the description of the rights conveyed, are of the most comprehensive character, embracing the land, soil, and waters. After a general description and designation of the territory embraced within the charter, and comprehending the premises in question, it adds, "Together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries

woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments, to the said several islands, lands, and premises, belonging and appertaining with all and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim, and demand of, in, or to the said lands, and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof, to have and to hold all and singular, the premises hereby granted, or herein mentioned, unto our brother James, Duke of York, his heirs and assigns forever; to be holden of us our heir and successor in free and common soccage." If these terms are not broad enough to include every thing susceptible of being conveyed, it is difficult to conceive what others could be employed for that purpose. The special verdict, after setting out the mesne conveyances, by which the title is deduced down to the proprietors of New Jersey, sets out a confirmation of the title in the proprietors by Charles the Second, as follows: "And the jurors on their oath aforesaid further say, that the said Charles the Second, afterwards, to wit, on the twenty-third day of November, in the year of our Lord one thousand six hundred and eighty-three, by a certain instrument in writing duly executed, bearing date on the same day and year last aforesaid; and reciting the said last-mentioned indenture from the said Duke of York, to the said twenty-four proprietors, did recognise their right to the soil and government of the said province of East New Jersey, whereof the tenements aforesaid with the appurtenances in the declaration aforesaid are parcel, and did strictly charge and command the planters and inhabitants, and all other persons concerned in the same, to submit and yield all due obedience to the laws and government of the said twenty-four proprietors, their heirs and assigns, as absolute proprietors and governors thereof, who, in the words of the said instrument in writing, had the sole power and right, derived under the said Duke of York, from him, the said Charles the Second, to settle and dispose of the said province of East New Jersey, upon such terms and conditions, as to

the twenty-four proprietors, their heirs and assigns, should deem meet." Here is the most full recognition and confirmation of the right and title of the proprietors to the soil, with the absolute power to dispose of the same in such manner as they should think proper. The absolute ownership could not be expressed in a more full and unqualified a manner. In the case of *Fairfax v. Hunter's Lessee*, 7 Cranch, 618, the question was as to the legal effect and operation of certain descriptive words in a charter of Charles the Second; and Mr. Justice Story, in giving the opinion of the Court, said: "The first question is, whether Lord Fairfax was proprietor of and seised of the soil, of the waste and unappropriated lands in the northern neck by virtue of the royal grants of Charles the Second, and James the Second; or whether he had mere seignioral rights therein as lord paramount, disconnected with all interest in the land, except of sale and alienation. The royal charter expressly conveys all that entire tract, territory, and parcel of land, situate, &c., together with all the rivers, islands, woods, timber, &c., mines, quarries of stone, and coal, &c., to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent, or purpose whatsoever." "It is difficult," say the Court, "to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof; and if the union of the title, and the exclusive use, do not constitute the complete and absolute dominion in the property, it will not be easy to fix any which shall constitute such dominion." The terms here used are certainly not more broad and comprehensive than those used in the charter under consideration; and if they will pass the right to the soil in the one case, they certainly must in the other. The land in the one case being covered with water, and in the other not, can make no difference as to the passing of the title, if land under water can be conveyed at all; and whatever the public right to the use of the water may be, it can give no right to the use of the land under the water, which has by the grant become private property. And if, as I think the authorities clearly show, a

grant of the soil carries with it the right to every private use to which it can be applied, including the cultivation of oysters, there can be no ground upon which this can be claimed as a common right. A several fishery and a common fishery are utterly incompatible with each other. The former is founded upon and annexed to the right of soil. And when that right of soil is acquired by an individual, the several fishery begins, and the common fishery ends.

Did the proprietors, then, by the surrender to Queen Anne, in the year 1702, relinquish any rights of private property in the soil derived under the charter of Charles the Second? I think it is very clear that they surrendered nothing but the mere powers of government granted by the charter, retaining unaffected in any manner whatever the right of private property.

The special verdict states this surrender as follows: "That on the fifteenth day of April, in the year one thousand seven hundred and two, the said twenty-four proprietors and the other persons, in whom, by sundry mesne conveyances and assurances in the law, the whole estate, right, title, and interest in the said province of East New Jersey, were vested at the said last-mentioned date, as proprietors thereof, by an instrument in writing under their hands and seals, bearing date the same day and year last aforesaid, did for themselves and their heirs surrender and yield up unto Anne, Queen of England, &c., and to her heirs and successors, all the powers and authorities in the said letters patent granted, to correct, punish, pardon, govern, and rule all or any of her said majesty's subjects or others who then were, as inhabitants, or thereafter might adventure into, or inhabit within the said province of East New Jersey. And also to nominate, make, constitute, ordain, and confirm any laws, orders, ordinances, directions, and instruments for those purposes, or any of them; and to nominate, constitute or appoint, revoke, discharge, change or alter any governor or governors, officers or ministers, which were or should be appointed within the said province; and to make, ordain, and establish any orders, laws, directions, instru-

ments, forms, or ceremonies of government and magistracy for or concerning the same, or on the sea, in going to or coming from the same, or to put in execution or abrogate, revoke or change such as were already made for or concerning such government, or any of them. And also the powers and authorities by the said letters patent granted, to use and exercise martial law in the said province of East New Jersey. And to admit any persons to trade or traffic there. And of encountering, repelling, and resisting by force of arms, any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns. And all other the powers, authorities, and privileges of and concerning the government of the province last aforesaid, or the inhabitants thereof, which were granted, or mentioned to be granted by the said several above-recited letters patent, or either of them. And that the said Queen Anne afterwards, to wit, on the seventeenth day of the same month of April, in the year last aforesaid, did accept of the said surrender of the said powers of government, so made by the said proprietors, in and over the premises last aforesaid."

I do not perceive, in this surrender, a single term or expression that can in the remotest degree have any reference to the private property conveyed by the grant, or to any matter except that which related to the powers of government. All the enumerated subjects manifestly have relation only to such powers. And after this specification of particulars comes the general clause, "and all other the powers, authorities, and privileges of and concerning the government;" necessarily implying that the specified subjects related to the powers of government; and the acceptance by the queen manifestly limits the surrender to such powers; she accepts the said surrender of the said powers of government so made by the proprietors in and over the premises.

If there was any thing in the language here used, which could in the least degree render doubtful the object and purpose of this surrender, the memorials of the proprietors, and the correspondence which took place on the subject referred to on the argu-

ment, as contained in the collection of Leaming and Spicer, must remove all doubt, and show that the surrender was confined exclusively to the powers of government, and intended to operate, not only as a surrender of such powers, but as a confirmation of all right and title to the soil and private property of the proprietors. And if so, the proprietors' right must depend upon the power of the king to grant the right claimed in the premises, and the construction of the charter, as to what it does embrace. And, I have endeavored to show, that by the settled and uncontradicted principles of the common law, the king had the power to grant the land under the water of a navigable river; and, that such grant carries with it to the grantee all rights of private property of which the land is susceptible, subject to the *jus publicum*. That the grant of the soil necessarily carries with it a several and exclusive fishery, which is utterly incompatible with the rights of a common fishery, and which of course can form no part of the *jus publicum*; and that the grant in question of Charles the Second to the Duke of York, conveyed all private right in the soil which could be conveyed by the king; all which rights, by sundry *mesne* conveyances, became vested in the proprietors of East New Jersey, and from them to the lessor of the plaintiff. And I can discover nothing in the authorities giving countenance to the idea that the king held the land covered by the waters of a navigable river as trustee, or by a tenure different from that by which he held the dry land. And I must again repeat, if the king held such lands as trustee for the common benefit of all his subjects, and inalienable as private property, I am unable to discover on what ground the State of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals. If it was a trust estate in the king for the benefit of his subjects, and upon the Revolution, the government of New Jersey became the trustee in the place of the king, and the trust devolved upon such government, and the land became as inalienable in the government of New Jersey, as in the hands of the king, and the State must be bound to hold all

such lands subject to the trust, which, as contended, embraces a common right of fishery in the waters, and the dredging for oysters in the land covered by the waters; and if this be so, there certainly can be no power in the State, without a breach of trust, to deprive the citizens of New Jersey of such common right, and convert these oyster grounds to the private and exclusive use of individuals.

There is nothing in the case, in my judgment, showing a usage in the State by which the proprietors have either directly or by implication relinquished or abandoned, any right of property which they derived under the charter of Charles the Second. All the authority exercised by the State in granting ferries, bridges, turnpikes, and rail-roads, &c, are the exercise of powers vested in the government over private property for public uses, and formed a part of the powers of government surrendered by the proprietors to Queen Anne; and it is only since the decision in *Arnold v. Mundy*, that the private right of the proprietors to the lands under the waters in New Jersey has been denied, and assumed by the State to grant the same to individuals; and even in such cases it has been done cautiously, and apparently with hesitation as to the right of the State. In the two cases referred to on the argument, of a grant to N. Burden, on the 8th of November, 1836, and to Aaron Ogden, on the 25th of January, 1837, of land under the water, the grant is a mere release or quit claim of the State; but the proprietors have been in the habit of making grants for land under the water from the time of the surrender to Queen Anne down to the year 1820, and numerous instances of such grants were referred to on the argument.

With respect, however, to the right of fishery, there is in my judgment a marked distinction, both in reason and authority, between the right in relation to floating fish, and the right of dredging for oysters. The latter is entirely local and connected with the soil. There are natural beds of oysters, but in other places there is a peculiar soil, adapted to the growing of oysters. They are planted and cultivated by the hand of man like other

productions of the earth ; and the books in many cases clearly hold up such a distinction, and speak of the oyster fishery as distinct from that of floating fish, 5 Burr. 2814 ; and in the case of *Rogers and others v. Allen*, Camp. Rep. 309, this distinction is expressly taken. It was an action of trespass for breaking and entering the several oyster fishery of the plaintiffs in Burnham river, and fishing and dredging for oysters. The defence set up was that the *locus in quo* was a navigable river, in which all the king's subjects had a right to fish and dredge for oysters ; and evidence was introduced showing that all who chose had been accustomed to fish in Burnham river for all sorts of floating fish without interruption ; and it was contended that a fishery was entire, and that as it had been proved that it was lawful for all the king's subjects to catch floating fish, so they might lawfully dredge for oysters. But Heath, Justice, ruled otherwise, and said a fishery was divisible ; a part may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property ; and although a new trial was granted upon another point in the case, the doctrine as above stated was not at all impugned by the Court of King's Bench.

Upon the whole, I am of opinion that the judgment of the Circuit Court ought to be affirmed.

POLLARD'S LESSEE, PLAINTIFF IN ERROR v. HAGAN ET AL.,
DEFENDANTS IN ERROR.

(3 Howard's U. States Sup. Court Rep. 212.)

THIS case was brought up by writ of error from the Supreme Court of Alabama.

It was an ejectment brought by the plaintiff in error in the Circuit Court (State Court) of Alabama, to recover a lot in the city of Mobile, described as follows, viz.: Bounded on the north by the south boundary of what was originally designated as John Forbes & Co.'s canal, on the west by a lot now or lately in the occupancy of, or claimed by, — Ezel, on the east by the channel of the river, and on the south by Government street.

The case was similar in its character to the two cases of *City of Mobile v. Emanuel et al.*, reported in 1 Howard, 95, and *Pollard's lessee v. Files*, 2 Howard, 592. In the report of the first of these cases the locality of the ground and nature of the case are explained.

In 1 Howard, 97, it is stated that the Court charged the jury, that "if the place in controversy was, subsequent to the admission of this State into the Union, below both high and low watermark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them by virtue of the act of Congress." And at page 98 it is remarked, that "the Supreme Court of Alabama did not decide the first point raised in the bill of exceptions, viz.: that Congress had no right to grant the land to the city of Mobile."

In the case of *Pollard's lessee v. Files*, it is remarked (2 Howard, 601) that "the arguments of both counsel as to the right of

the State of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the Court does not touch upon that point.

In the present case, there were objections made upon the trial below to the admission of certain evidence which was offered by the defendant; but these objections were not pressed, and the whole argument turned upon the correctness of the charge of the Court, which was as follows: "That if they believed that the premises sued for were below usual high water-mark, at the time the State of Alabama was admitted into the Union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiff no title, whether the waters had receded by the labor of man only, or by alluvion; to which plaintiff excepted, and the Court signs and seals this bill of exceptions."

Under these instructions the jury found for the defendant, and the Supreme Court of Alabama affirmed the judgment. From this last Court the case was brought up, under the 25th section of the Judiciary Act, and the only question was upon the correctness of the above instructions.

Coxe, for the plaintiff in error.

Sergeant, for the defendant in error.

Coxe, for plaintiff in error, said, that the only point presented upon the record grew out of the charge of the Court. The plaintiff gave in evidence a patent from the United States for the premises in question; an act of Congress, July 2d, 1836, and an act of 26th May, 1824. Proof was given that the waters of Mobile bay, at high tide, overflowed the premises during all the time up to 1822.

This same title has been before the Court already and confirmed. 1 Howard, 95; 2 Howard, 591.

The act of Congress admitting Alabama into the Union is in 6 Laws U. S. chap. 458, p. 380. The 6th section contains a proviso, that all navigable waters shall remain public highways, &c. Unless this section prevents the land described in the patent from

belonging to the United States, the plaintiff must recover under it.

In 14 Peters, 361, the land in question was situated just like this, and the title was confirmed. So in 16 Peters, 234, 245. In these two cases there is an implied opinion of the Court upon the point now under consideration, and the expressed opinion of one judge. 16 Peters, 262, 266.

In 2 Howard, 599, the point was expressly raised by the counsel on the other side.

If the land did not belong to the United States, it belonged to nobody. Neither the State of Alabama nor the city of Mobile had any title to it. Many lands are in the same situation, subject to be overflowed, and if they belong to nobody, there is an end to all improvement of them, and they must remain public nuisances.

Sergeant, for defendant in error, stated the following points:—

1. The plaintiff rested his case entirely upon the act of Congress of the 2d July, 1836, and the patent issued under it, showing no previous or other right. The act and the patent gave him no title to the premises, because,

1st. The United States had nothing to grant or to release; the right, if any, between high and low water-mark being in the State of Alabama, and not in the United States; and if ever in the United States, after Alabama became a State, was passed away and parted with by the act of 1824.

2d. The right and title in and to the premises in question were vested in those under whom defendant claims, by a valid grant from Spain before the treaty of 1803, namely, by the grant of June 9th, 1802.

3d. The grant from Spain, calling for the river as a boundary, maintained the same boundary and followed the river.

4th. The length of the line referred to in the grant does not limit defendant's right, because it is not stated for the purpose of limiting the right, but only as the then distance to the river; be-

cause it actually went into the river, and also because the call for the river controls both course and distance.

2. The act of Congress could not operate as a release or confirmation, because there was no right or color of right for a release or confirmation to operate upon.

3. The right of the defendant was saved and confirmed by the act of 1824, so as to place it thenceforward beyond doubt or question.

(All of Mr. Sergeant's remarks which bear upon other points than the one upon which the opinion of the Court rested are omitted.)

Had the United States any title to land covered by navigable water, after the admission of Alabama into the Union? Judge Catron has decided in favor of the United States, but the Court has expressed no opinion in preceding cases. The land in question was a part of the shore of the river when Alabama was admitted, and was so when the act of 1824 passed. It was a part of the river. What is a river? Are not its banks included? In the language of Courts, there are two distinct parts of a river, its shore and its channel. The shores sometimes extend a mile out. They may be left bare at low tide, but are still a part of the river, either for the purposes of navigation or fishing. Beyond that is the channel. The record describes this land as being bounded by the channel of the river. The question, whether the United States had a title after 1817, was not decided in *14 Peters*, nor in *16 Peters*, nor in *Pollard v. Files*. It is of little importance to the United States, because free navigation is secured, but of great magnitude to the State. It has been said, that if the decision be against the United States, the shores must remain unimproved. But not so. Their improvement requires local regulation. They are avenues to navigation, and want a nearer guardian than the United States. Other States have the control of similar property. The United States describe the limits of a port in their revenue laws, and if they want a local property they buy it. A State can manage this sort of property better than the United

States, who have never done any thing with it. The question is important to the new States, as involving an attribute of sovereignty, the want of which makes an invidious distinction between the old and new States. In 9 Porter, 577, there is an outline of the argument upon this subject, and the authorities are cited. See also 589, 591. It is not material for me to examine the power of the King of Spain, because after the transfer in 1803, the country became subject to the common law and statute laws of the United States, except as to previous grants.

At page 596, this particular question is examined, and the case in 10 Peters referred to.

It appears, therefore, that the Supreme Court of Alabama studied the subject, and there is no adverse decision in this or any State Court. On the contrary, the decision of Alabama has been sustained by this Court in principle.

A right to the shore between high and low water-mark is a sovereign right, not a proprietary one. By the treaties of 1802 and 1819 there is no cession of river shores, although land, forts, &c., are mentioned. Why? Because rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the State or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty. 16 Peters, 367, 410, 413, 416.

It follows from this decision, that the rights over rivers became severed from the rights over property. In Pennsylvania, after the Revolution, an act was passed confiscating the property of the Penn family; but no act was passed transferring the sovereignty of the State. The reason is, that no act was necessary. Sovereignty transferred itself, and when this passes, the right over rivers passes too. Not so with public lands. The right which New Jersey acquired in 16 Peters, was precisely the right which Alabama claims now. There can be no distinction between those States which acquired their independence by force of arms and

those which acquired it by the peaceful consent of older States. The Constitution says, the latter must be admitted into the Union on an equal footing with the rest. The dissenting opinion of Judge Thompson (page 419) is not inconsistent with this.

If these positions are right, the United States had nothing below high water-mark. They might have reserved it in the compact with the State. The third article of the treaty with Spain (1 Land Laws, 57) contains such a reservation. But as it is, the United States have nothing in Alabama but proprietary rights. They cannot put their foot in a State to claim jurisdiction without its consent. No principle is more familiar than this, that whilst a State has granted a portion of its sovereign power to the United States, it remains in the enjoyment of all the sovereignty which it has not voluntarily parted with. This Court, though inexpressibly valuable to the country, is yet a Court of limited jurisdiction. In the Constitution, what power is given to the United States over the subject we are now discussing? In a territory they are sovereign, but when a State is erected a change occurs. A new sovereign comes in. Where the power of taxation occurs, it is because it has been yielded by compact. 1 McLean's Rep. 337, 339, 343, 344, 354, 371, 374, 378.

The case in 10 Peters, 731, *New Orleans v. The United States*, sanctions the idea, that the power of which we have been speaking must be held in trust; that the kings of France had jurisdiction over the shore, but it was a police power, and used for the common benefit, not as a proprietary right. If the trust be in the State of Alabama, the United States cannot defeat that trust. The right of accretion could not belong to the United States, because it belongs to the adjacent proprietor.

Cose, in reply, insisted, that former decisions of this Court cover this case. The nature of the ground in question is fully shown in 9 Porter, 580, 581; that the tide rises one and a half or two feet. In 10 Peters, 667, property similarly situated is described, where the water would overflow unless confined by

banks. It has been said, that the United States cannot exercise acts of ownership over it ; but it is conceded that Spain had, and exercised jurisdiction to the extent of granting it to individuals. 10 Peters, 679, 680, 681 ; attorney-general's opinion, 16 Peters, 252 ; 9 Porter, 591.

In 10 Peters, 662, no question like the present was raised, as to the power to grant, but whether the property ever had been granted.

The case of *New Orleans v. United States* involved merely the question, whether the land had been dedicated to the public. It was like the *Pittsburg* and *Cincinnati* cases, differing only as to the facts proved to substantiate such dedication, and the code of law which was to govern it. The citations from *Domat* (723) are designed merely to point out the places which belong to the public. No question was presented or decided, nor was any opinion indicated as to the points involved in this controversy.

Prior to the treaty by which the United States acquired this territory, the former sovereign claimed and exercised the rights which the United States have undertaken to exercise. But it is said, that we must show that our government could be the recipient of this power. Suppose we cannot. Then the right must remain in Spain, which would be a strange result. But we say,

1. That portion of sovereign power which is vested in the United States by our Constitution and laws is unlimited.

2. The exercise of power by any department or functionary of the government, as among and operating on ourselves, is limited.

3. The sovereign power as a nation in its foreign intercourse is subject to no constitutional restraint.

But it is contended, that the right to the shore is a sovereign and political, not a proprietary right. In what the distinction exists, so far as it is applicable to this controversy, has not been explained, and is not easy to be understood. That there is an immense body of lands in all our alluvial territory, from the North River to the Sabine, including the meadows between Newark and

New York, those on the Delaware, the rice plantations of Carolina and Georgia, the marshes of Florida, the swamps of Louisiana, is a matter of fact. They are subject to periodical inundations, some daily, some by occasional freshets, some with the semi-annual rise of waters. According to the argument on the other side, all these are to be considered part of the shore. How can a political power be said to exist without a proprietary right over marshes where no one can live?

It is said the treaties of 1803 and 1819 nowhere specify rivers, and from this the conclusion is drawn that they passed as part of the sovereignty. It seems more probable that they passed as part of the territory. Islands are mentioned, out in the ocean, under which we hold Key West, Tortugas, &c. Why should they be considered merely as incidents to sovereignty, and not part of the territory? The language of the grant is, in "full property and sovereignty."

The treaty of 1795, with Spain, (1 Laws U. S. 264), in designating the boundaries, speaks of them which separate the territories of the contracting parties, and establish part of this line of territory in the middle of a river. Article 4th designates the middle of the channel, or bed of the Mississippi, as the western boundary. In this treaty, as in that of 1819, a river is the boundary, and its free navigation is secured. Did any one ever suppose that either party precluded itself from using the highway, or from holding or disposing of the lands on the banks subject to inundation?

It is said that the land which was in question in *Martin v. Waddell*, 16 Peters, 369, was similarly situated to the present; that it was below high water, and thence it is inferred that it was above low water-mark. But the special verdict indicates no such thing. It says, "covered with water," "where the tide ebbs and flows." Nor is there any thing in the passages cited (410, 413, 416) conflicting with this idea. New Jersey, who asserted the right sustained in that case, would be astonished to learn the construction now placed upon it, denying the right of private

property in the flats left bare at low water, or in the valuable meadows protected by banks from daily inundation, and converted into productive property, conducive equally to health and wealth.

In the lands thus situated, which had not been severed from the public domain, the United States had the capacity to acquire, and did acquire, a proprietary interest. Nor is this repugnant to our constitution or laws, or the principles of our government. Throughout the Union such property is held by individuals under titles sanctioned by legislative acts and judicial decisions.

The sea-shore and arms of the sea, "like other public property, may be granted by the king or government to individual proprietors." 2 Dane's Abr. 690, 691.

The Massachusetts colony act of 1691 grants numerous pieces of flats to the proprietors of the adjoining uplands. This was in strict conformity with the English law. The soil on which the sea flows and ebbs, that is, between high and low water-marks, may be parcel of a manor. Where the tide flows, it is within the jurisdiction of the admiralty; where the tide ebbs, the land may belong to a subject. Every thing done on the land when the sea is out, shall be tried at common law; 5 Co. 107, Constable's case. In New York and New Jersey, the inlets of the sea on Long Island and between the Passaic and Hackensack, have all been reclaimed and converted into meadows. When New York claimed the entire jurisdiction of the North River, she never thought of claiming the meadows and marshes on the Jersey side, although they were covered at every high tide by the waters of that river.

On the Delaware, in the States of Delaware, New Jersey and Pennsylvania, the same law prevails.

In Maryland, South Carolina, and Georgia, valuable private property has been thus reclaimed from the water.

Throughout our western country, Ohio, Indiana, Illinois, Missouri, Louisiana, Alabama, Mississippi, no question has ever been raised on this point until these cases first presented it. Millions

of acres are thus held. The right has been uniformly asserted by the United States. It was so in the act of 20th April, 1818, for the sale of Fort Charlotte lands, which gave rise to the suits in *Peters and Porter*. 9 Porter; 16 Peters, 250; 6 Laws U. S. 346.

The act of May 26th, 1824, expressly grants land of this description, and the act of July, 1836, does the same.

All the title under these acts are now in controversy. It is said that the United States have little or no interest in this question; but their interest is of incalculable value. See *Darley's Louisiana*, as to the amount of overflowed lands.

The right has been judiciously recognised. In 16 Peters, 408, *United States v. Fitzgerald*, where there was a claim under the pre-emption laws. In the five different cases in which this very grant has been disputed. *Pollard v. Kibbe*, 14 Peters, 355, where the title of both parties was presented. So far as the plaintiff's title appears, it was identical with that now exhibited, with the only addition of the Spanish origin, which had been rejected by the board of commissioners. The defendant's title the same as now. All the objections now urged to the plaintiff's title were then apparent on the record. *Mobile v. Esclawa*, 16 Peters, 234; 9 Porter; *Mobile v. Hallett*, 16 Peters, 261; *Mobile v. Emanuel*, 1 Howard, 95; *Pollard v. Files*, 2 Howard, 592.

Mr. Justice McKINLEY delivered the opinion of the Court.

This case comes before this Court upon a writ of error to the Supreme Court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants, in the Circuit Court of Mobile County, in said State; and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an act of Congress passed the 6th day of July, 1836, confirming to them the premises in the patent mentioned, together with an act of Congress passed the 20th of May, 1824.

The premises in question were admitted by the defendants to be comprehended within the patent; and there was likewise an admission by both parties that the land lay between Church street and North Boundary street, in the city of Mobile; and there the plaintiffs rested their case."

"The defendants, to maintain the issue on their part, introduced a witness to prove that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile river at common high tide;" to which evidence the plaintiffs by their counsel objected; but the Court overruled the objection, and permitted the evidence to go to the jury. "It was also in proof, on the part of the defendant, that at the date of the Spanish grant to Pantón, Leslie & Co., under which they claim, the waters of the Mobile bay, at high tide, flowed over what is now Water street, and over about one-third of the lot west of Water street, conveyed by the Spanish grant to Pantón, Leslie & Co.; and that the waters continued to overflow Water street, and the premises sued for, during all the time up to 1822 or 1823; to all which admissions of evidence, on part of the defendants, the plaintiffs excepted." "The Court charged the jury, that if they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the Union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion; to which the plaintiffs excepted. Whereupon a verdict and judgment were rendered in favor of the defendants, and which judgment was afterwards affirmed by the Supreme Court of the State."

This question has been heretofore raised, before this Court, in cases from the same State, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided. And we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones. Although this is the first time we have been called

upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the State governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous, well considered, decisions of this Court, to which we shall have occasion to refer in the course of this investigation.

The counsel for the plaintiffs insisted, in argument, that the United States derived title to that part of Alabama, in which the land in controversy lies, from the King of Spain; and that they succeeded to all his rights, powers, and jurisdiction, over the territory ceded, and therefore hold the land and soil, under navigable waters, according to the laws and usages of Spain; and by those laws and usages the rights of a subject to land derived from the crown could not extend beyond high water-mark, on navigable waters, without an express grant; and that all alluvion belonged to the crown, and might be granted by this king, together with all land between high water and the channel of such navigable waters; and by the compact between the United States and Alabama, on her admission into the Union, it was agreed, that the people of Alabama for ever disclaimed all right or title to the waste or unappropriated lands lying within the State, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the State should for ever remain public highways, and free to the citizens of that State and the United States, without any tax, duty, or impost, or toll therefor, imposed by that State. That by these articles of the compact, the land under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts, would be to yield up to Alabama, and the other new States, all the public lands within their limits.

We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or

any of the new States were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana.

All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the State of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory northwest of the river Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia, authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the State, by a proper deed to convey to the United States, for the benefit of said States, all the right, title, and claim, as well of soil as jurisdiction, "upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be republican States, and admitted members of the federal Union, having the same rights of sovereignty, freedom, and independence, as the other States." And the delegates conclude the deed thus: "Now know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of the power and authority committed to us by the act of the said general assembly of Virginia before recited, and in the name and for and on behalf of the said commonwealth, do by these presents convey,

transfer, assign, and make over unto the United States in Congress assembled, for the benefit of said States, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, to and for the uses and purposes, and on the conditions of the said recited act."

And in the deed of cession by Georgia it is expressly stipulated, "That the territory thus ceded shall form a State, and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the northwestern territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The manner in which the new States were to be admitted into the Union, according to the ordinance of 1787, as expressed therein, is as follows: "And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States in all respects whatever." Thus it appears that the stipulations, trusts, and conditions, are substantially the same in both of these deeds of cession; and the acts of Congress, and of the State legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however — the cession made by Virginia was before the adoption of the Constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of

the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories.

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the *eminent domain*. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. *Vat. Law of Nations*, section 244. This definition shows, that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the State of Georgia, was sanctioned by the Constitution of the United States; by the 3d section of the 4th article of which it is declared, that "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress."

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes

provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new State to exercise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of

the old States, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded ; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their respective borders, and they, and the original States, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose. The provision of the Constitution above referred to, shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new States, "that they for ever disclaim all right and title to the waste or unappropriated lands lying within the said territory ; and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people, in the

new States and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever State or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new State where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a Constitution and State government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress, to pass the act granting to the plaintiffs the land in controversy.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits. The principal argument relied on against this right, is, that the United States acquired the land in controversy from the King of Spain. Although there was no direct reference to any particular treaty, we presume the treaty of the 22d of February, 1819, signed at Washington, was the one relied on, and shall so consider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the King of Spain; and as by the laws and usages of Spain, the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title.

If it were true that the United States acquired the whole of

Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it. *Vat. Law of Nations*, b. 1, c. 19, s. 210, 244, 245, and b. 2, c. 7, s. 80.

The United States have never claimed any part of the territory included in the States of Mississippi or Alabama, under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795, "The high contracting parties declare and agree, that the line between the United States and East and West Florida, shall be designated by a line, beginning on the river Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahouchee river," &c. This treaty declares and agrees, that the line which was described in the treaty of peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.

Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect, she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers to take their property

with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows, that Spanish grants made after the treaty of peace can have no intrinsic validity." *Henderson v. Poindexter*, 12 Wheat. 535.

Previous to the cession made by Georgia, the United States, by the act of Congress of the 7th of April, 1798, had established the Mississippi territory including the territory west of the Chatahouchee river, to the Mississippi river, above the 31st degree of north latitude, and below the Yazous river, subject to the claim of Georgia to any portion of the territory. And the territory thus erected was subjected to the ordinance of the 13th of July, 1787, for its government, that part of it excepted which prohibited slavery. 1 Story's Laws, 494. And by the act of the 1st of March, 1817, having first obtained consent of Georgia to make two States instead of one within the ceded territory, Congress authorized the inhabitants of the western part of the Mississippi territory to form for themselves a constitution and State government, "to consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi at the point where the Southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line, to the northwest corner of Washington county; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; then west along said degree of latitude to the Mississippi river; thence up the same to the beginning." 3 Story's Laws, 1620. And on the 3d of March, 1817, Congress passed an act declaring, "That all that part of the Mississippi territory which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido

river ; thence east to the western boundary line of the State of Georgia ; thence along said line to the southern boundary line of the State of Tennessee ; thence west, along said boundary line, to the Tennessee river ; thence up the same to the mouth of Bear creek ; thence by a direct line to the northwest corner of Washington county ; thence due south to the Gulf of Mexico ; thence eastwardly, including all the islands within six leagues of the shore to the Perdido river ; thence up the same to the beginning ; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama."

And by the 2d section of the same act it is enacted, " That all offices which exist, and all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law." 3 Story's Laws, 1634, 1635. And by the 2d article of the compact contained in the ordinance of 1787, which was then in force in the Mississippi territory, among other things, it was provided, that " The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, and of judicial proceedings according to the course of the common law." And by the proviso to the 5th section of the act of the 2d of March, 1819, authorizing the people of the Alabama territory to form a Constitution and State government, it is enacted, " That the Constitution, when formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the States and the people of the territory northwest of the Ohio river, so far as the same has been extended to the said territory [of Alabama] by the articles of agreement between the United States and the State of Georgia." By these successive acts on the part of the United States, the common law has been extended to all the territory within the limits of the State of Alabama, and therefore excluded all other law, Spanish or French.

It was after the date of the treaty of the 22d of February, 1819, between the United States and Spain, but before its ratification, the people of the Alabama territory were authorized to form a

Constitution ; and the State was admitted into the Union, according to the boundaries established when the country was erected into a territorial government. But the United States have never admitted, that they derived title from the Spanish government to any portion of the territory included within the limits of Alabama. Whatever claim Spain may have asserted to the territory above the thirty-first degree of north latitude, prior to the treaty of the 27th of October, 1795, was abandoned by that treaty, as has been already shown. We will now inquire whether she had any right to territory below the thirty-first degree of north latitude, after the treaty between France and the United States, signed at Paris on the 30th of April, 1803, by which Louisiana was ceded to the United States. The legislative and executive departments of the government have constantly asserted the right of the United States to this portion of the territory under the 1st article of this treaty ; and a series of measures intended to maintain the right have been adopted. Mobile was taken possession of, and erected into a collection district, by act of the 24th of February, 1804, chap. 13, (2 Story's Laws, 914). In the year 1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country, as far as the Perdido, and hold it for the United States. In April, 1812, Congress passed an act to enlarge the limits of Louisiana. This act includes part of the country claimed by Spain, as West Florida. And in February, 1813, the President was authorized to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not then in the possession of the United States. And these measures having been followed by the erection of Mississippi territory into a State, and the erection of Alabama into a territory, and afterwards into a State, in the year 1819, and extending them both over this territory ; could it be doubted that these measures were intended as an assertion of the title of the United States to this country ?

In the case of *Foster and Elam v. Neilson*, 2 Peters, 253, the right of the United States to this country underwent a very able

and thorough investigation. And Chief Justice Marshall, in delivering the opinion of the Court, said: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own Courts would certainly be an anomaly in the history and practice of nations. If those departments, which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own Courts that this construction is to be denied." The Chief Justice then discusses the validity of the grant made by the Spanish government, after the ratification of the treaty between the United States and France, and it is finally rejected on the ground that the country belonged to the United States, and not to Spain, when the grant was made. The same doctrine was maintained by this Court in the case of *Garcia v. Lee*, 12 Peters, 511. These cases establish, beyond controversy, the right of the United States to the whole of this territory, under the treaty with France.

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others v. Waddell*, 16 Peters, 410, the present Chief Justice, in delivering the opinion of the Court, said: "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all

their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, "that all navigable waters within the said State shall for ever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State," would be void if inconsistent with the Constitution of the United States. But is this provision repugnant to the Constitution? By the 8th section of the 1st article of the Constitution, power is granted to Congress "to regulate commerce with foreign nations, and among the several States." If, in the exercise of this power, Congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed, by this article of the compact, on the State of Alabama, then this article is a mere regulation of commerce among the several States, according to the Constitution, and, therefore, as binding on the other States as Alabama.

In the case of *Gibbons v. Ogden*, 9 Wheat. 196, after examining the preliminary questions respecting the regulation of commerce with foreign nations, and among the States, as connected with the subject-matter there in controversy, Chief Justice Marshall said: "We are now arrived at the inquiry; What is this power?"

"It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case.

If, as has been always understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." As the provision of what is called the compact between the United States and the State of Alabama does not, by the above reasoning, exceed the power thereby conceded to Congress over the original States on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama.

This supposed compact is, therefore, nothing more than a regulation of commerce, to that extent, among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the State of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution

to the United States, but were reserved to the States respectively. Secondly. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the Supreme Court of the State of Alabama is, therefore, affirmed.

Mr. Justice CATRON dissented.

The statute of 1836, and the patent of the United States founded on it, by which the land in controversy was granted to Wm. Pollard's heirs, have on several occasions heretofore received the sanction of this Court as a valid title.

1. In the case of *Pollard's heirs v. Kibbe*, 14 Peters, 353, the Supreme Court of Alabama having pronounced an opposing claim under the act of 1824 superior to Pollard's, this Court reversed the judgment and established the latter, after the most mature consideration.

2. In the case of *Pollard v. Files*, 2 How. 591, the precise title was again brought before this Court, and very maturely considered; it was then said — (page 602) — “This Court held, when Pollard's title was before it formerly, that Congress had the power to grant the land to him by the act of 1836; on this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama refers, (in its opinion in the record), grew out of the construction given by a majority of the Court to the act of 1824, by which the vacant lands east of Water street were granted to the city of Mobile.”

On this occasion the decision of the Supreme Court of Alabama was again reversed, and Pollard's heirs ordered to be put into possession, and they now maintain it under our two judgments. It is here for the third time.

In the mean time, between 1840 and 1844, a doctrine had

sprung up in the Courts of Alabama, (previously unheard of in any Court of Justice in this country, so far as I know), assuming that all lands temporarily flowed with tide-water were part of the eminent domain, and a sovereign right in the old States; and that the new ones, when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of State sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the Courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new States coming in, with equal rights appertaining to the old ones, took the high lands as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a State. Louisiana was admitted in 1812; to her the same rules must apply that do to Alabama. All acquainted with the surface of the latter know that many of the most productive lands there, and now in successful cultivation, were in 1812 subject to overflow, and have since been reclaimed by levees.

It is impossible to deal with the question before us understandingly, without reference to the physical geography of the delta of the Mississippi and the country around the gulf of Mexico, where the most valuable lands have been made and are now forming by alluvion deposits of the floating soils brought down by the great rivers; the earlier of which had become dry lands; but the more recent were flowed, when we acquired the country; and are in great part yet so; thus situated, they have been purchased from the United States and reclaimed; a process that is now in daily exercise. An assumption that mud-flats and swamps once flowed, but long since reclaimed, had passed to the new States, on the

theory of sovereign rights, did, at the first, strike my mind as a startling novelty; nor have I been enabled to relieve myself from the impression, owing to the fact in some degree, it is admitted, that for thirty years neither Congress, nor any State legislature, has called in question the power of the United States to grant the flowed lands, more than others; the origin of title, and its continuance, as to either class, being deemed the same. A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should, as I think, be concluded by long acquiescence, and especially in Courts of Justice.

Again: the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident. In such a case, where there is doubt, and a conflict suggested, the political departments, State and federal, should settle the matter by legislation; by this means private owners could be provided for and confusion avoided; but no State complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States, or by their agents, in the execution of the great trust imposed on the latter to dispose of the public domain for the common benefit; on the contrary, we are called on by a mere trespasser in the midst of a city, to assert and maintain this sovereign right for his individual protection, in sanction of the trespass.

But as already stated, the United States may be an owner of property in a State, as well as another State, or a private corporation, or an individual may. That the proprietary interest is large, cannot alter the principle. I admit if the agents of the United States obstruct navigation, the State authorities may remove the obstructions and punish the offenders; so the States have done for many years without inconvenience, or complaint.

Nor can material inconvenience result. If a front to a city, or land for another purpose is needed, Congress can be applied to for a grant, as was done by the corporation of Mobile in 1824,

If the State where the land lies was the owner, the same course would have to be pursued. The States and the United States are not in hostility; the people of the one are also the people of the other; justice and donation is alike due from each.

Connecticut was once a large proprietor in the Northwest Territory, (now Ohio). She owned the shores of a great lake and the banks of navigable rivers. Can it be assumed that the admission of Ohio defeated the title of Connecticut, and that she could not grant? The question will not bear discussion; and how can the case put be distinguished from the one before us? Nay, how can either be distinguished from the rights of private owners of lands above water, or under the water? Yet in either instance, is the owner in fee deprived of his property, on this assumption of sovereign rights.

The front of the city of Mobile is claimed by the act of 1824, sanctioned by this Court as a valid grant in the five cases of *Pollard v. Kibbe*, 14 Peters; of *The City of Mobile v. Eslava*, 16 Peters, 234; of *The City of Mobile v. Hallett*, 16 Peters, 261; of *The City of Mobile v. Emanuel*, 1 How. 95, and of *Pollard v. Files*, 2 How. 591. Except the grant to Pollard, the act of 1824 confers the entire title, (so far as is known to this Court), of a most valuable portion, and a very large portion, of the second city on the gulf of Mexico, in wealth and population. This act is declared void in the present cause; and the previous decisions of this Court are either directly, or in effect, overthrown, and the private owners stripped of all title. On this latter point my brethren and I fully agree. Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will of necessity have to adopt some system of giving title, if it is possible to do so, aside from private legislation; as the flowed lands are too extensive and valuable for the latter mode of grant in all instances.

The charge of the State Court to the jury was, that the act of Congress of 1836, and the patent founded on it, and also, of

course, the act of 1824, were void, if the lands granted by them were flowed at high tide when Alabama was admitted ; and it was immaterial whether the mud-flat had been filled up and the water excluded by the labor of man or by natural alluvion. And this charge is declared to have been proper, by a majority of this Court.

The decision founds itself on the right of navigation, and of police connected with navigation. As a practical truth, the mud-flats and other alluvion lands in the delta of the river Mississippi, and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance. This is well illustrated by the recent history of Mobile. When the act of 1824 was passed, granting to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud-flat, slightly covered with water at high tide, of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and of course by individual enterprise, as the vacant space, as was apparent, must become city property ; and it is now formed into squares and streets, having wharves and warehouses. The squares are built up ; and the fact that that part of the city stands on land once subject to the flow of tide, will soon be matter of history. At New Orleans, and at most other places fronting rivers where the tide ebbs and flows, as well as on the ocean and great lakes, navigation is facilitated by similar means ; without their employment few city fronts could be formed, at all accommodated to navigation and trade. To this end private ownership is indispensable and universal ; and some one must make title. If the United States have no power to do so, who has ? I repeat, can Alabama grant the soil ? She disavowed all claim and title to and in it, as a condition on which Congress admitted her into the Union. By the act of March 2, 1819, (3 Story's Laws, 1726), the Alabama territory was authorized to call a convention, and form a State Constitution ; but Congress imposed various restrictions, and among others the following one : " And provided

always, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory do agree and declare that they for ever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States."

On the 2d of August, 1819, the convention of Alabama formed a Constitution, and adopted an ordinance declaring "that this convention, for and on behalf of the people inhabiting this State, do ordain, agree, and declare, that they for ever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States." In addition, all the propositions offered by the act of March 2, 1819, were generally accepted without reservation.

On the 14th of December, 1819, Congress, by resolution, admitted Alabama as a State, on the conditions above set forth. 3 Story's Laws U. S. 1804.

That the lands in contest, and granted by the acts of 1824, and 1836, were of the description of "waste or unappropriated," and subject to the disposition of the United States, when the act of Congress of the 2d of March, 1819, was passed, it is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a State to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the State, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, if the United States

cannot grant these lands, neither can Alabama ; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine of a majority of my brethren mainly tends. The assumption is, that flowed lands, including mud-flats, extending to navigable waters, are part of such waters, and clothed with a sovereign political right in the State ; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction ; and being part of State sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void. Conceding to the theory all the plenitude it can claim, still Alabama has only political jurisdiction over the thing ; and it must be admitted that jurisdiction cannot be the subject of a private grant.

The present question was first brought directly before this Court, (as I then supposed, and now do), in the cause of *The City of Mobile v. Eslava*, in 1840, when my opinion was expressed on it at some length. It will be found in 16 Peters, 247, and was in answer to the opinion of the Supreme Court of Alabama, sent up as part of the record ; having been filed pursuant to the statute of that State, found in Clay's Digest, 286, sec. 6. My opinion, then given, has been carefully examined, and so far as it goes, is deemed correct, (except some errors of the press), nor will the reasons given be repeated.

In Hallett's case, 16 Peters, 263, reasons were added to the former opinion. And again, in the case of Emanuel, the question is referred to, in an opinion found in 1 How. 101.

In *Pollard's Lessee v. Files*, 2 How. 602, the question, whether Congress had power to grant the land now in controversy, was treated as settled. As the judgment was exclusively founded on the act of 1836, (the plaintiff having adduced no other title), it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to

myself to say, that it was the unanimous judgment of the members of the Court then present.

I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this Court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds — principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

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